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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 154.

THE REPUBLICAN RIVER BRIDGE COMPANY, PLAINTIFF IN ERROR,

vs.

THE KANSAS PACIFIC RAILWAY COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

FILED FEBRUARY 27, 1874.

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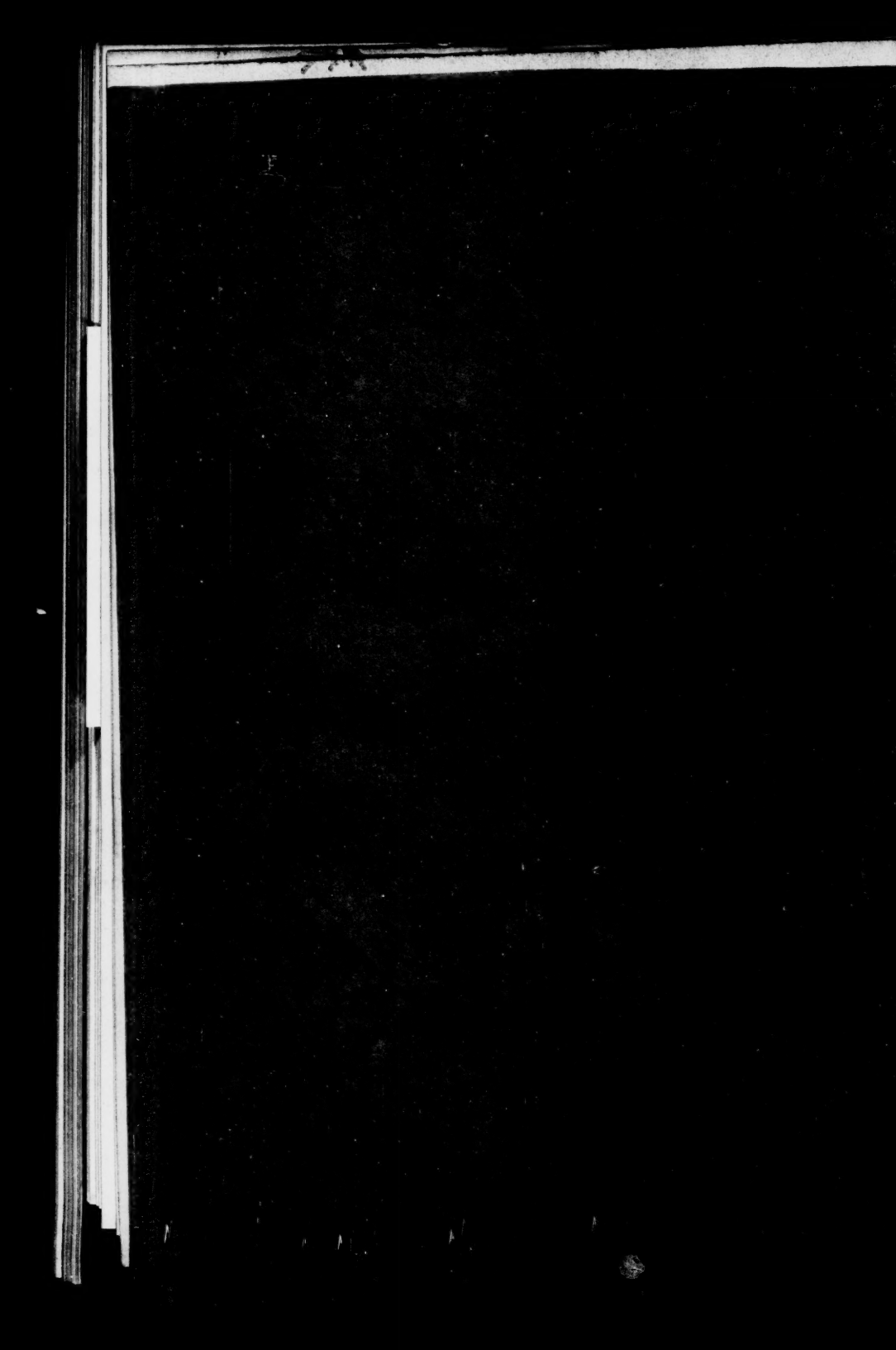

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1 Be it remembered that heretofore, to wit, on the 21st day of January, A. D. 1874, there was filed in the office of the clerk of the supreme court of the State of Kansas, U. S. A., certain papers in a cause then pending in said court wherein the Republican River Bridge Company was plaintiff in error and the Kansas Pacific Railway Company was defendant in error, both said parties being then corporations duly organized and existing under and by virtue of the laws of Kansas, and situate and resident within said State of Kansas.

And thereupon it was, upon application of said plaintiff in error, ordered that a transcript of the record of the said cause, upon a writ of error being duly served therein from the Supreme Court of the United States, be made by the clerk of this court for the purposes of said writ of error, which is accordingly done, as appears hereinafter.

2 In the supreme court of the State of Kansas, U. S. A.

Be it remembered that the supreme court of the State of Kansas met in regular session for its January term, A. D. 1874, upon the 6th day of January, A. D. 1874.

And there were present Hon. Samuel A. Kingman, chief-justice; Hon. Daniel M. Valentine and Hon. David J. Brewer, associate justices, and A. Hammatt, esq., clerk.

And thereupon, and upon January 21st, 1874, it being the twelfth judicial day of said term, the following proceedings were had, to wit:

3 THE REPUBLICAN RIVER BRIDGE COMpany, plff. in error,
vs.
THE KANSAS PACIFIC RAILWAY COMPANY, deft. in error. } No. 840.

Comes now said plaintiff in error and files a paper, of which the following is a copy, to wit:

In the supreme court of the State of Kansas.

THE REPUBLICA*tion* RIVER BRIDGE COMPANY, plaintiff,
vs.
THE KANSAS PACIFIC RAILWAY COMPANY, deft.

THE STATE OF KANSAS,
Shawnee County, ss:

I, Samuel D. Houston, being duly sworn according to law, do depose and say that the land and property being the subject-matter of the litigation in the above-entitled suit is of an actual value in cash exceeding the sum of two thousand and five hundred dollars, and that I well know the said tract of land.

SAMUEL D. HOUSTON.

4 Subscribed in my presence and sworn to before me this 20th day of January, A. D. 1874.

[L. S.]

A. HAMMATT,
Clk. Sup. Court Kansas.

(Endorsed:) Republican River Bridge Company vs. Kansas Pacific Railway Company. Affidavit of value. Filed Jan. 21st, 1874. A. Hammatt, clerk supreme court.

And thereupon, and on said January 21st, 1874, appeared said Republican River Bridge Company, by its counsel, B. F. Stringfellow, esq., and filed a paper, of which the following is a copy, to wit:

To the Hon. S. A. Kingman, chief-justice of the supreme court of the State of Kansas:

The petition of the Republican River Bridge Company respectfully represents, that at a regular term of the supreme court of the
5 State of Kansas, begun and held at Topeka, in said State, on the 6th day of January, A. D. 1874, in a certain action at law then pending in said court, wherein the Republican River Bridge Company your petitioner, is plaintiff, and the Kansas Pacific Railway Company is defendant, a judgment was rendered by said supreme court against your petitioner, and in favor of said Kansas Pacific Railway Company, the said supreme court being the highest court in which a decision could be had in the said suit in said State of Kansas, and that the said judgment is final. And your petitioner further shows that in the rendition of said judgment against your petitioner there was drawn in question the validity of an authority exercised under the United States; the decision of said supreme court was against its validity; and further, that there was also drawn in question, in the rendition of said judgment by said supreme court, the construction of statutes of the United States, and the decision of said supreme court was against the title, right, and privilege specially set up and claimed under such statutes; all which appears manifest in the record and proceedings in said suit.

Whereupon your petitioner prays that a writ of error removing the record and proceedings in said suit, with all things concerning
6 the same, to the Supreme Court of the United States, and the proper citation be directed to the said Kansas Pacific Railway Company, be allowed. And your petitioner will ever pray.

B. F. STRINGFELLOW,
Attorney for Plaintiff.

STATE OF KANSAS,
Shawnee County, ss:

I, Benjamin F. Stringfellow, attorney for the above-named plaintiff, make oath, and say that I verily believe the facts set forth in the foregoing petition to be true.

B. F. STRINGFELLOW.

Subscribed in my presence and sworn to before me this 20th day of January, A. D. 1874.

[L. S.]

A. HAMMATT,
Clk. Sup. Ct. Kansas.

(Endorsed:) Application for a writ of error and citation in the within case. Allowed. Samuel A. Kingman, chief-justice of the supreme court of the State of Kansas. The Rep. Riv. Br. Co. vs. K. P. R. W. Co. Filed January 21st, 1874. A. Hammatt, clerk supreme court.

7 And thereupon, upon said January 21st, A. D. 1874, there was

filed in said clerk's office a writ of error, of which the following is a copy, to wit:

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the supreme court of the State of Kansas, greeting:

Because of the record and proceedings, as also in the rendition of the judgment which is in the said supreme court before you, or some of you, being *being* the highest court of law or equity of the said State in which a decision could be had in the said suit between the Republican River Bridge Company, plaintiff, and the Kansas Pacific Railway Company, defendant, wherein was drawn in question the validity of an authority exercised under the United States, and the decision was against its validity, and wherein also was drawn in question the construction of statutes of the United States, and the decision was against the title, right, and privilege specially set up and claimed under such statutes, a manifest error hath happened, to the great damage of the said the Republican River Bridge Company, as by their complaint appears: We, being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this
8 behalf, do command you, if judgment be therein rendered, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so taht you may have the same at Washington on the first Monday of December next, in the said Supreme Court to be held then and there, that, the record of proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right should be done.

Witness the Hon. Nathan Clifford, Acting Chief-Justice of the Supreme Court of the United States, this 20th January, A. D. 1874.

A. S. THOMAS, *Clerk.*

(Endorsed:) The Rep. Riv. Br. Co. vs. The K. P. R'way Co. Writ of error. Filed January 21st, A. D. 1874. A. Hammatt, clerk supreme court.

9 And thereupon, upon said January 21st, A. D. 1874, there was filed in said clerk's office a bond for supercedias, of which the following is a copy, to wit:

Know all men by these presents, that we, the Republican River Bridge Company and S. M. Strickler, are held and bound unto the Kansas Pacific Railway Company, its successors and assigns, in the sum of one thousand dollars, for the payment of which we bind ourselves, our successors, heirs, and assigns, jointly and severally, firmly by these presents. Dated this 20th January, A. D. 1874.

Whereas lately, at a supreme court of the State of Kansas, in a suit pending in said court between the said the Republican River Bridge Company, plaintiff, and the Kansas Pacific Railway Company, defendant, a judgment was rendered against the said Republican River Bridge Company, and the said Republican River Bridge Company having obtained a writ of error to the Supreme Court of the United States to reverse the said judgment so rendered in the said suit by the supreme court of the State of Kansas:

Now, therefore, the condition o fthe above bond is such that if the above-

named Republican River Bridge Company shall prosecute its said writ of error with effect, and answer all damages and costs if it fail to make good its plea, then the above obligation shall be void; otherwise
10 shall be in full force and virtue.

THE REPUBLICAN RIVER BRIDGE COMPANY,
By S. M. STRICKLER,
President.
S. M. STRICKLER.

This bond approved by me this 20th day of January, A. D. 1874.
SAMUEL A. KINGMAN,
Chief-Justice Supreme Court Kansas.

(Endorsed:) Rep. Riv. Br. Co. vs. K. P. R. W. Co. Bond for supercedias. Filed January 21st, 1874. A. Hammatt, clerk supreme court.

And thereupon, upon said January 21st, A. D. 1874, there was filed in said clerk's office a citation in error, of which the following is a copy, to wit:

UNITED STATES OF AMERICA:

To the Kansas Pacific Railway Company, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the
11 first Monday in December next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Kansas, wherein the Republican River Bridge Company is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice done to the parties in that behalf.

Witness the Hon. Nathan Clifford, Acting Chief-Justice of the Supreme Court of the United States this 20th January, A. D. 1874.
SAMUEL A. KINGMAN,
Chief-Justice of the Supreme Court of the State of Kansas.

(Endorsed:) Rep. Riv. Br. Co. vs. K. P. R. W. Co. Citation in error. Filed January 21st, 1874. A. Hammatt, clerk supreme court.

TOPEKA, KANSAS, *February 5th*, 1874.

I hereby acknowledge service of this citation in error upon said defendant in error, the Kansas Pacific Railway Company.
J. P. USHER,
Attorney and Counselor for said Kansas Pacific Railway Company.

12 Be it remembered that on the 26th day of January, 1872, there was filed in the said clerk's office the petition in error and transcript of the record of the district court of Davis County, Kansas, in said case, which is as follows, to wit:

THE STATE OF KANSAS:

In the supreme court of the State of Kansas.

THE REPUBLICAN RIVER BRIDGE COMPANY, plaintiff in error,
against
THE KANSAS PACIFIC RAILWAY COMPANY, defendant in error.

Petition in error.

The said plaintiff in error, the Republican River Bridge Company,

complains of the said the Kansas Pacific Railway Company, defendant in error, and says:

That at the January term of the district court of the third judicial district of the State of Kansas, sitting in and for Shawnee County, in said State, on the day of January, A. D. 1872, the said defendant in error, by the consideration of said court, recovered a judgment against the plaintiff in error in a certain action then pending in said court,
13 wherein the said plaintiff in error was plaintiff below, and the said defendant in error was defendant below, a copy of the record of the proceedin' and judgment, in which case, duly certified, is hereto attached, marked "A," and made part of this petition; and this plaintiff in error avers that there is error in said record and proceedings in this, to wit:

1st. That said court erred in its conclusions of law numbered 1, 3, and 4 on the conclusion of fact found by the court.

2nd. That said court erred in overruling the motion of plaintiff below for judgment in its favor on the conclusions of fact found by the court.

3rd. That said court erred in rendering judgment against plaintiff below, and in favor of defendant below, on the conclusion of fact found by the court below.

4th. That said court erred in ordering the motion of plaintiff below to set aside the judgment of said court in favor of said defendant below, and to render judgment in favor of plaintiff below.

The plaintiff in error therefore prays that said judgment may be set aside and reversed, and the said plaintiff restored to all things that he has lost by reason thereof.

B. F. STRINGFELLOW,
Attorney for Plaintiff in error.

14 The issuing of process is waived and the appearance of the defendant is hereby entered to this petition in error, with the reservation to file and enter upon this petition cross-errors, if it shall be expedient so to do.

January 26th, 1872.

J. P. USHER,
Attorney for Defendant in Error.

In the supreme court of Kansas.

THE REPUBLICAN RIVER BRIDGE COMPANY,
plaintiff in error,
vs.
THE KANSAS PACIFIC RAILWAY COMPANY,
defendant in error.

The defendant in error alleges that in the record and proceedings of the Shawnee district court in the suit whereof a transcript of the record is hereto attached manifest error hath intervened in this, to wit, that the court erred in its 2nd and 3d conclusions of law, upon which this defendant prays judgment and for such errors, as well as upon the conclusions of law in favor of this defendant, defendant prays that the judgment of said district court may be affirmed.

J. P. USHER,
Attorney for Defendant in Error.

(A.)

15 Pleas in the district court in and for Shawnee County, State of Kansas.

THE REPUBLICAN RIVER BRIDGE COMPANY, plaintiff,
vs.
THE KANSAS PACIFIC RAILWAY COMPANY, defendant. } 683.

Be it remembered that on the 18th day of July, A. D. 1870, was filed in the clerk's office of the district court in and for the county of Shawnee, in the third judicial district of the State of Kansas, a certain transcript of the pleadings and record in the above-entitled cause on change of venue from the district court of Davis County, in said State, in the words and figures following, to wit:

Be it remembered that on the 17th day of September, A. D. 1869, the Republican River Bridge Company filed in the clerk's office in the district court in and for the county of Davis, and State of Kansas, their petition against the Kansas Pacific Railway Company, and which petition is in words and figures as follows, to wit:

In the district court for the 8th judicial district of the State of Kansas, for Davis Co.

THE REPUBLICAN RIVER BRIDGE COMPANY, plaintiff,
vs.
THE KANSAS PACIFIC RAILWAY COMPANY, defendant.

16 *Petition.*

Plaintiff states that it is a corporation duly incorporated under the laws of the State of Kansas, and that defendant is also a corporation duly incorporated under the laws of said State, and plaintiff says for its 1st cause of action—

1st. That plaintiff has the legal title to and is entitled to the possession of the following described premises, situate in said county of Davis, and known and described as special section eleven, in township twelve south, of range 5 east.

2nd. The defendant has, ever since the 13th of June, A. D. 1868, unlawfully kept the plaintiff out of the possession of the said premises.

3rd. The defendant, whilst it unlawfully kept plaintiff out of the possession of said premises as above stated, and ever since the 13th day of June, 1868, has received the rents and profits of said premises of the value of one thousand dollars, and refuses to account for or to pay plaintiff any part of said rents and profits.

4th. The plaintiff asks judgment for the delivery of the possession of said premises to it, and also for the sum of one thousand dollars on account of said rents and profits.

B. F. STRINGFELLOW,
WHITE AND AUSTIN,
Plaintiff's Attorneys.

17 And thereupon, on the precipe of the said plaintiff, the following summons was issued, and which summons is in words and figures as follows, to wit:

Summons.

THE STATE OF KANSAS,
Eighth District, Davis County, ss:

The State of Kansas to the sheriff of Davis County, greeting:

You are hereby commanded to notify the Kansas Pacific Railway Company that they have been sued by the Republican River Bridge Company in the district court sitting in and for said county of Davis, and that unless they answer, by the seventeenth day of October, A. D. 1869, the petition of the said Republican River Bridge Company against them, filed in the clerk's office of said court, such petition will be taken as true and judgment rendered accordingly. You will make due return of this summons on the 27th day of September, A. D. 1869.

Witness my hand and the seal of said court, affixed at my office, in the city of Junction, this 17th day of September, A. D. 1869.

[SEAL.] WM. S. BLAKELY, *Clerk.*

18 (Endorsement:) District court, Davis County, Kansas. The Republican River Bridge Company, plaintiff, vs. The Kansas Pacific Railway Company, defendant. Issued September 17th, 1869. Returnable September 27th, 1869. Plaintiff asks judgment for the delivery of the possession of premises described in their petition, and also for the sum of one thousand dollars on account of rents and profits arising from said premises. Attest: William S. Blakely, clerk. Filed September 20th, A. D. 1869. William S. Blakely, clerk.

And on the 20th day of September, A. D. 1869, said summons was returned by the sheriff of Davis County, the following return endorsed thereon.

STATE OF KANSAS,
Davis County, ss:

Received this writ on this 17th day of September, A. D. 1869, at 3 o'clock p. m.; and September 18th, A. D. 1869, in the town of Junction City, Davis County, Kansas, personally served, by delivering to George C. Lyman, general agent of the Kansas Pacific Railway Company, at Junction City, Davis County, Kansas, a certified copy of this summons, with all the endorsements thereon.

CHARLES W. TAZIER,
Sheriff of Davis County, Kansas.
By WM. H. WHITE, *Undersheriff.*

19 And on the 5th day of October, A. D. 1869, the defendant filed his answer to the petition of the plaintiff, and which answer is in words and figures as follows, to wit:

Answer.

THE REPUBLICAN RIVER BRIDGE COMPANY, plaintiff,
vs.
THE KANSAS PACIFIC RAILWAY COMPANY, defendant.

1st. The defendant denies each and every allegation in the petition of the plaintiff.

2d. The defendants have no knowledge of special section eleven, in

the county of Davis, and they deny that there is such section. They say that they are in the possession of particular section one under and by virtue of a joint resolution of the Congress of the United States, passed and approved, and an execution order of the President of the United States, and also by virtue of the several acts of Congress in aid of the construction of the Union Pacific Railroad and branches; and that if the plaintiff pretends that the lands in their petition mentioned are located upon or near in part or all of fractional section one aforesaid, the plaintiff has no right or title thereto, but the same belongs to the defendant.

J. P. USHER & E. W. DENNIS,
Attys. for Defendant.

20 In the district court in and for the county of Davis, Kansas.

THE REPUBLICAN RIVER BRIDGE COMPANY, plaintiff,
vs.
THE KANSAS PACIFIC RAILWAY COMPANY, defendant.

Motion to strike out answer.

The plaintiff moves the court to strike out the defences set up in their answer, because the said several defences are alleged so indefinitely and uncertainly that the precise nature of the defense is not apparent, and because the first pretended defense attempts to deny the title of plaintiff, and at same time deny that defendant is in possession of the property claimed by plaintiff, and because the second pretended defense neither admits possession of defendant of the property claimed nor admits nor denies the title of plaintiff, but seems to aim to set up title in defendant to other property.

B. F. STRINGFELLOW,
Attorney for Plaintiff.

In the 8th judicial district court of the State of Kansas, within and for the county of Davis.

THE REPUBLICAN RIVER BRIDGE COMPANY, plaintiff,
vs.
THE KANSAS PACIFIC RAILWAY COMPANY, defendant.

21 *Amended answer.*

1st. The defendant says it denies that the plaintiff has any title to the land and premises described in the petition as there alleged.

2nd. The defendant further says, that it is the owner of, and now is, and has been since July 20, 1866, in actual and lawful possession of the following described lands and premises, situate in Davis County, State of Kansas, viz: Fractional section one, (1,) in township twelve (12) south, of range five (5) east of the 6th principal meridian in Kansas, and that the above-described fractional section one is the same land and premises claimed by the plaintiff, and described in said petition as special section eleven, (11,) township twelve (12) south, of range (5) east, but the defendant denies that the plaintiff has any right or title to the same.

3d. The defendant denies that it is indebted to the plaintiff in any sum whatsoever for rents and profits, as alleged in said petition.

E. W. DENNIS, McCLURE & HUMPHREY,
Attorneys for Defendant.

Change of venue.

State of Kansas, 8th judicial district. Kansas, district court, Davis County, adjourned March term, his honor Wm. H. Canfield presiding.

THE REPUBLICAN RIVER BRIDGE COMPANY, plaintiff,
vs.
THE KANSAS PACIFIC RAILWAY CO., DEFENDANT.

22 The above-entitled action being on the calendar of this term for trial, and the judge being disqualified to preside on the trial of the case, for reasons stated, and the parties, by their respective attorneys, in open court appearing, the plaintiff by B. F. Stringfellow, and the defendant by E. W. Dennis and McClure and Humphrey, and considering thereto and applying therefor, it is ordered that the place of trial of this action be changed to the county of Shawnee, in the 3d judicial district of this State, and the clerk of this court will forthwith transmit to the clerk of the district court at Topeka, Kansas, a complete transcript of all the pleadings, proceedings, and papers in this cause, according to statutes in case of change of venue.

Approved.

B. F. STRINGFELLOW.
E. W. DENNIS.

Certificate.

STATE OF KANSAS,
County of Davis, ss:

I, A. F. Owen, clerk of the district court in and for the county of Davis and State of Kansas, do hereby certify that the foregoing is a true transcript of all the pleadings, proceedings, and papers in the case of the Republican River Bridge Company vs. The Kansas Pacific Railway Company, as is shown by the records of the district court.

23 Witness my hand and official seal at office in Junction City, this the 2d day of July, A. D. 1870.

[SEAL OF COURT.] A. T. OWEN, *Clerk.*

Upon which are the endorsements following, to wit:

The Republican River Bridge Company vs. The Kansas Pacific R'way Co. 683. Filed July 18th, 1870. Hiram McArthur, clerk.

And afterwards, to wit, on the 10th day of August, A. D. 1870, at the June term, A. D. 1870, of the court aforesaid, among others, were had the following proceedings, to wit:

Ordered on trial docket.

THE REPUBLICAN RIVER BRIDGE COMPANY
vs.
THE KANSAS PACIFIC RAILWAY COMPANY. } 683.

And now comes the parties, by their attorneys, and on motion of

plaintiff, defendant consenting, it is ordered that this cause be entered on the trial docket for this term of court.

And afterwards, to wit, on the 10th day of August, A. D. 1870, said plaintiff filed in the clerk's office of the court aforesaid its certain motion in the words and figures following, to wit:

24 *Motion filed.*

In the district court for the 3d judicial district of Kansas, for Shawnee County.

REPUBLICAN RIVER BRIDGE COMPANY, PLAINTIFF,
against
THE KANSAS PACIFIC RAILWAY COMPANY, DEFENDANT.

The plaintiff moves the court to strike out the second defense set up in the amended answer, because the same does not present any issue of law or fact; because the same is argumentative, and does not either deny possession of defendant or title of plaintiff to the land set out in petition, nor does it aver title in defendant to the land sued for.

B. F. STRINGFELLOW,
For Plaintiff.

Which motion is endorsed as follows, to wit:

Rep. Riv. Br. Co. vs. K. P. R. W. Co. Motion to strike out 2nd defense. Filed August 10, 1870. Hiram McArthur, clerk.

And afterwards, to wit, on the 10th day of August, A. D. 1870, at the June term, A. D. 1870, of the court aforesaid, among others were had the following proceedings, to wit:

2d count of deft's. amended ans. stricken out.

THE REPUBLICAN RIVER BRIDGE COMPANY
vs.
THE KANSAS PACIFIC RAILWAY COMPANY. } 683.

25 And now comes said plaintiff, by B. F. Stringfellow, its attorney, and also comes said defendant, by J. P. Usher and McClure, its attorneys, and said plaintiff moves the court to strike out the 2nd count in defendant's amended answer. And said motion, being argued by counsel and considered by the court, is sustained; to which ruling of the court said defendant at the time excepted.

And afterwards, to wit, on the 11th day of August, A. D. 1870, at the June term, A. D. 1870, of the court aforesaid, among others, were had the following proceedings, to wit:

Trial.

THE REPUBLICAN RIVER BRIDGE COMPANY
vs.
THE KANSAS PACIFIC RAILWAY COMPANY. } 683.

And now comes the said plaintiff, by B. F. Stringfellow, its attorney,

and also comes said defendant, by J. P. Usher and McClure, its attorneys, and this cause coming on for trial, the parties waive a jury and submit the trial of this cause to the court. And the court, after hearing the evidence and argument, do find for the defendant. Wherefore, it is considered and adjudged by the court that the said defendant recover his costs herein of said plaintiff, to be taxed by the clerk.

26 And afterwards, to wit, on the 11th day of August, A. D. 1870, at the June term, A. D. 1870, of the court aforesaid, among others, were had the following proceedings, to wit:

New trial granted.

THE REPUBLICAN RIVER BRIDGE COMPANY } 683.
vs.
THE KANSAS PACIFIC RAILWAY COMPANY. }

On motion of the said plaintiff, by B. F. Stringfellow, its attorney, it is ordered by the court that the judgment heretofore rendered in this action, and the findings of the court herein, be, and they hereby are, wholly vacated and set aside, and a new trial granted in this cause. And by agreement of the parties it is ordered that this cause be set for another trial at the present term of this court, and that said cause be tried on the last Monday in September next.

And afterwards, to wit, on the 4th day of May, A. D. 1871, at the December term, A. D. 1871, of the court aforesaid, among others, were had the following proceedings, to wit:

Continued to next term.

THE REPUBLICAN RIVER BRIDGE COMPANY } 683.
vs.
THE KANSAS PACIFIC RAILWAY COMPANY. }

27 And now comes said plaintiff, and also comes said defendant, and on motion of said plaintiff and by consent of defendant, it is ordered that this cause be continued to the next term of court.

And afterwards, to wit, on the 29th day of June, A. D. 1871, at the June term, A. D. 1871, of the court aforesaid, among others, were had the following proceedings, to wit:

Leave to file amended answer.

THE REPUBLICAN RIVER BRIDGE COMPANY } 683.
vs.
THE KANSAS PACIFIC RAILWAY COMPANY. }

And now come said plaintiff, by B. F. Stringfellow, its attorney, and also comes said defendant, by J. P. Usher, E. W. Dennis, and J. H. McClure, its attorneys. And on motion of said defendant, leave is given defendant to file an amended answer herein.

And afterwards, to wit, on the 29th day of June, A. D. 1871, said de-

fendant filed in the clerk's office of the court aforesaid its certain amended answer, in the words and figures following, to wit:

Amended answer filed.

THE REPUBLICAN RIVER BRIDGE COMPANY, plaintiff,
against
THE KANSAS PACIFIC RAILWAY COMPANY, defendant.

28 In the district court, Shawnee County, Kansas.

The defendant, for answer, says that, as to all that part and portion of the premises described in the petition not included within the boundaries of the particular description hereinafter mentioned, the defendant is not in the possession of, and makes no claim or title thereto; but that as to the following-described premises, to wit: Beginning at the clasing corner to fractional sections 1 and 2 on the former line of the Fort Riley military reservation, in township 12, south of range 5 east; thence north 16° 05′ east, variation 11° 12′ east, 39 chains 67 links; thence east, variation 10° 40′ east, 80 chains; thence south 0° 15′ east, variation 3° 30′ east, 79 chains 82 links; thence south 89° 10′ west, variation 11° 12′ east, 26 chains 88 links to the clasing corner to fractional sections 1 and 12 on the former line of the Fort Riley military reservation; thence along said former line of Fort Riley military reservation north 52° west, variation 11° 30′ east, 68 chains 20 links to the place of beginning, containing 532.45 acres, more or less, which premises are embraced within the tract of land specified in the petition, the defendant defends, and avers that it is in possession of the same, and denies that the plaintiff has any right or title thereto, and denies that the plaintiff has
29 sustained damages, as in the petition is averred.

JNO. P. USHER,
Attorney for Defendant.

Upon which are the endorsements following, to wit: No. 683, R. R. B. Co. vs. K. P. R. W. Co. Amended answer. Filed June 29, 1871. Hiram McArthur, clerk. John P. Usher, for defendant.

And afterwards, to wit, on the 5th day of January, A. D. 1872, at the December term, A. D. 1871, of the court aforesaid, among others, were had the following proceedings, to wit:

Judgment —Findings of fact and of law.

In the district court for the third judicial district of the State of Kansas, sitting in and for the county of Shawnee.

THE REPUBLICAN RIVER BRIDGE COMPANY, plaintiff,
vs.
THE KANSAS PACIFIC RAILWAY COMPANY, defendant.

This cause coming on for trial, and both parties waiving a jury, the issues joined are tried by the court, without the intervention of a jury,

and both plaintiff and defendant requesting of the court separate findings of fact and of law, the court, after hearing the evidence and the arguments of counsel, finds as conclusions of fact:

1st. That the Congress of the United States adopted a joint
30 resolution (approved July 26, 1866) entitled "A resolution granting the right of way through military reserves to the Union Pacific Railroad Company and its branches," of which the following is a copy:

"No. 85. A resolution granting the right of way through military reserves to the Union Pacific Railroad Company and its branches.

"Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That, subject to approval by the President, the right of way, one hundred feet in width, is hereby granted to the Union Pacific Railroad Company and the companies constructing the branch roads connecting therewith, for the construction and operation of their roads over and upon all military reserves through which the same may pass; and the President is hereby authorized to set apart to the Union Pacific Railway Company, eastern division, twenty acres of the Fort Riley military reservation, for depot and other purposes, in the bottom opposite 'Riley City;' also, fractional section 'one' on the west side of said reservation, near Junction City, for the same purposes; and also to restore, from time to time, to the public domain any portion of said military reserve over which the Union Pacific Railroad or any of its branches may pass, and which shall not be required for military purposes: Provided, That the President
31 shall not permit the location of any such railroad or the diminution of any such reserve in any manner so as to impair its usefulness for military purposes as long as it shall be required therefor.

"Approved July 26th, 1866."

2d. That, in pursuance of said joint resolution, the President of the United States did, on the 19th day of July, A. D. 1867, by an executive order of that date, approve of, "the aforesaid grant specified in said joint resolution," and did set apart to the Union Pacific Railway Company, eastern division, (now known by the name of the Kansas Pacific Railway Company,) the defendant in this action, fractional section one (1) specified in said joint resolution, which fractional section one (1) is in township 12 south, range 5 east, and is parcel of the land described in the plaintiff's petition, and is the land described in the defendant's answer, for which the defendant defends and denies the title of the plaintiff, and that there was attached to the said order of the President a map, to which reference was by said order made, which map substantially designated said lands so set apart to said railway company as fractional section one (1) in township 12 south range 5 east, which map was a copy of a map accompanying a letter from the Secretary of the Interior of February 15th, 1867, to the treasurer of the defendant, and of which executive order of the President the following is a copy:

32 "CITY OF WASHINGTON,
"*District of Columbia:*

"To all whom it may concern:

"Whereas by a joint resolution approved July 26th, 1866, it was resolved by Congress as follows: 'That, subject to approval by the President, the right of way, one hundred feet in width, is hereby granted to the Union Pacific Railroad Company and the companies constructing the branch roads connecting therewith, for the construction and opera-

tion of their roads over and upon all military reserves through which the same may pass; and the President is hereby authorized to set apart to the Union Pacific Railroad Company, eastern division, twenty acres of the Fort Riley military reservation, for depot and other purposes, in the bottom opposite Riley City; also, fractional section one on the west side of said reservation, near Junction City, for the same purposes; and also to restore, from time to time, to the public domain any portion of said military reserve over which the Union Pacific Railroad or any of its branches may pass, and which shall not be required for military purposes: Provided, That the President shall not permit the location of any such railroad or the dimunition of any such reserve in any manner so as to impair its usefulness for military purposes so long as it shall be required therefor;'

33 "And whereas it appears by the report of Lieutenant-General W. T. Sherman, commanding the Military Division of the Missouri, that the location of the Union Pacific Railroad through it has been judiciously made, so as not to impair its usefulness for military purposes, and that the 'twenty-acres' chosen for a depot and the fractional section 'one' on the west side of said reservation, near Junction City, can also be granted the company without impairing the usefulness for military purposes of the reservation:

"It is, therefore, ordered by the President that the aforesaid grant specified in said joint resolution of Congress be, and the same is hereby, approved.

"And, by virtue of the aforesaid resolution, there is set apart to the Union Pacific Railway Company, eastern division, twenty acres of the Fort Riley military reservation, for depot and other purposes, in the bottom opposite Riley City, and fractional section 'one' on the west side of said reservation, near Junction City, for the same purposes as designated on a map or survey accompaning letter from the Secretary of the Interior, dated 15th February, 1867, to William J. Palmer, treasurer Union Pacific Railway Company, eastern division, hereto annexed, the aforesaid premises being set apart as aforesaid for the purposes specified by the terms of said joint resolution, and according to its true meaning and effect.

"Witness my hand and the seal of the War Department this

34 19th day of July, in the year of our Lord one thousand eight hundred and sixty-seven.

"By the President of the United States:

[SEAL.] (Signed) "ANDREW JOHNSON,
"*President,*

(Signed) "EDWIN M. STANTON,
"*Secretary of War.*"

3. That the northern boundary-line of said township 12 south, range 5 east, was surveyed by Frederick Hawn, a deputy surveyor of the United States, in the month of July, 1857, and who established, in conformity to law, landmarks along said line from west to east at the quarter-section corners; and the northeastern and northwestern corners of said fractional section one (1) were established by said surveyor, and monuments erected by him at said corners; that the survey of said Hawn was duly approved by John Caltown, surveyor-general, August 21st, 1857; that said Deputy-Surveyor Hawn made regular field-notes of his said survey, which field-notes, with a diagram, were filed in the office of the surveyor-general before the approval of the survey, where they have since remained.

4. That William Weir, jr., a deputy surveyor of the United States, run the eastern line of said township, in November, 1856, and established, in conformity to law, landmarks along said line from south to north
35 at the section and quarter-section corners, until he reached the Fort Riley military reservation, in which he did not put up any monuments or designate his line by any landmarks, and there was no landmarks or monuments of any kind at the northeast corner of the township until the same was established and erected by Deputy-Surveyor Hawn, in order to class his survey, which monument, placed by Hawn as aforesaid, became the established northeast corner of the township; that this corner is east of a true line run north by Weir, upon which he made no landmarks, and that all the sections on the north line of said township were surveyed and platted to conform to the line and landmarks run and made by Surveyor Hawn; the east lines of sections one to six, inclusive, bearing east of north, instead of being true north and south lines.

5. That Penebacker and Vandeveer, deputy surveyors of the United States, in the autumn of 1857, surveyed and subdivided all of township twelve (12) south, range five (5) east, aforesaid, except that portion which was situate within the Fort Riley military reservation, and established the proper section, quarter-section, and closing corners thereon and that said Penebacker and Vandeveer, in making their said survey, established the line between sections one (1) and twelve (12) to its intersection with the Fort Riley military reservation, the length of said line being fifty-three (53) chains and seventy (70) links; and they
36 also established the line between sections one (1) and two (2) to its intersection with the Fort Riley military reservation, the length of said line being forty-one (41) chains and eighty-eight (88) links, and put land-marks at the point of intersection of the south and west lines of said section one (1) with the line of said military reservation; that they made proper field-notes of their said *field-notes of their said* surveys, and filed the same in the office of the surveyor-general of Kansas Territory, which surveys, so made by them, were approved September 18th, 1858, by Ward B. Burnett, surveyor-general.

6. That Robert Armstrong, a deputy surveyor of the United States, in the month of March, 1870, surveyed fractional section one, (1,) in township twelve, (12,) range five (5) east, in the Fort Riley military reservation, and established all of the corners thereof, except such as had been established by Hawn, Penebacker, and Vandeveer; that the monuments and land-marks placed by Penebacker and Vand'eer remained, and were found as placed by them; also, the monument erected by Hawn at the northeast corner of the township remained, and was found by said Armstrong as placed by said Hawn; that the land-marks at the northwest corner of said fractional section one (1) erected by Hawn was missing; its place was supplied by Arm-
37 strong with another to mark said corner of section one, (1.) Said Armstrong surveyed and closed the line from said northwest corner south 16° 10′ W., thirty-nine chains and sixty-seven links in length, to the monument or land-mark erected by Penebacker and Vandeveer on the west line of said section, at its intersection with the line of the Fort Riley military reservation. He also surveyed and established the line, twenty-six (26) chains and eighty-eight (88) links in length, between sections one (1) and twelve, (12,) from the point of intersection of the line of said military reservation with said sections established by Penebacker and Vandeveer and the land-marks by them erected east to the southeast corner of the section upon the line run by

Deputy Surveyor Weir in 1856 aforesaid; and thence he ran a direct line, seventy-nine chains and eighty-two links in length, to the monument in the northeast corner of the township, erected by Hawn, as aforesaid; that the said Armstrong, in making his said survey, was governed and controlled by the field-notes made by Deputy Surveyors Weir and Hawn and Penebacker and Vand'veer, and instructions from the surveyor-general requiring him to be so governed, all of which were furnished him to make said survey; that the field-notes of the said Armstrong were returned and filed in the office of the surveyor-general, and were approved by C. W. Babcock, surveyor-general, April 5th, 1870, and that said survey was made in pursuance of direc-
38 tions from the Commissioner of the General Land-Office, and the lines of said fractional section one, (1,) surveyed and established by said Armstrong, are the same lines mentioned and specified in defendant's answer as the exterior lines of fractional section one (1) in the Fort Riley military reservation, and that this is the only fractional section one (1) on the west side of said reserve, near Junction City, and that Junction City is, in fact, on a part of this same section one, (1,) without the former lines of the reserve.

7. That the said survey by Deputy-Surveyor Armstrong was the first and only complete survey of all the lines of said fractional section one (1.)

8. That all of the surveys herein mentioned were duly made in pursuance of laws of the United States, and under the authority and direction of the proper officers of the United States; that the defendant constructed the railroad across said section in the summer and autumn of 1866, and erected its depot-buildings and shops thereon, and has since continued to operate said road.

9. That on the 2d day of March, 1867, the Congress of the United States adopted and passed the following resolution, which was approved by the President and took effect on that day:

"*Public resolution—No.* 37.

39 "Joint resolution for the reduction of the military reservation of Fort Riley, and to grant land for bridge purposes to the State of Kansas.

"Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the southwestern boundary of the military reservation of Fort Riley, in the State of Kansas be, and the same is hereby, declared to be hereafter the channel of the Republican River from its mouth to the point where said river intersects the present western line of said reservation, and the land released from said reserva' and lying between the Smoky Hill and Republican Rivers, is hereby granted to the State of Kansas to aid in the construction of a bridge over the Republican River, on the public highway leading through the present reservation, but upon the express condition that this grant shall be accepted by the State of Kansas with a guarantee given by said State, by an act of the legislature thereof, that said bridge shall be kept up and maintained in good condition, and shall be free to the use of the Government of the United States for all transit purposes forever, without tolls or charges; and on such acceptance and guarantee being filed in the office of the Secretary of the Interior, together with the certificate of the governor of Kansas that a good and permanent bridge has been constructed over the said Republican

River, it shall be the duty of the said secretary to issue patent for the land hereby granted to the State of Kansas, or to such company as may be authorized by act of the legislature of said State to construct said bridge: Provided, however, That nothing herein contained shall be construed to interfere with any grant of any part of said land heretofore made by the United States.

"Approved March 2d, 1867."

10. That on the 26th day of February, 1867, the following act was passed by the legislature of the State of Kansas, and approved by the governor of said State on that day, and took effect on the 13th day of March, 1867:

"CHAPTER XXXIV.—*Bridge across the Republican River.*

"An act accepting a certain grant of land from the United States to the State of Kansas for bridge purposes, and authorizing the Republican River Bridge Company to construct such bridge.

"Be it enacted by the legislature of the State of Kansas—

"SECTION 1. That the joint resolution passed by the Congress of the United States at the 39th session thereof, and entitled 'A joint resolution for the reduction of the military reservation of Fort Riley, and to grant land for bridge purposes to the State of Kansas,' be, and the same is hereby, accepted by the State of Kansas upon the terms and conditions therein named and the guarantee therein required, 'that

41 a bridge shall be constructed over the Republican River, on the public highway leading through the present Fort Riley military reservation, and that said bridge shall be kept up and maintained in good condition, and shall be free to the use of the Government of the United States and the citizens of the State of Kansas, for all transit purposes forever, without tolls or charges,' is hereby given.

"SEC. 2. The Republican River Bridge Company, of Davis County, whose certificate of incorporation was, on the 11th day of November, A. D. 1864, filed in the secretary of state's office, is hereby authorized and empowered to proceed, under its charter, to construct said bridge.

"SEC. 3. It shall be the duty of said Republican Bridge Company to complete said bridge within one year from the date of the passage and approval of this act; and immediately after the completion of said bridge, it shall be the duty of said bridge company to notify the governor of this State that such bridge has been completed; whereupon, within ten days after receiving such notice, the governor shall, in person, together with a competent engineer, proceed to examine said bridge; and, if, upon such examination, the governor shall find that a good and permanent bridge has been by said Republican River Bridge Company constructed over the said Republican River, it shall be his duty, within ten days thereafter, to certify the same to the Secretary of the Interior,

42 which certificate, together with a certified copy of this act, shall be by the governor transmitted to the Secretary of the Interior at Washington, D. C., for the purpose of having the same filed in his office; and the governor shall, at the time of transmitting said certificate and copy of this act, also transmit to the Secretary of the Interior a request that he issue patent for the land mentioned and described in the joint resolution of Congress referred to in the first section of this act, to said Republican River Bridge Company.

"SEC. 4. That before the governor shall make request to the Secretary of the Interior to issue patent to said land to said Republican River Bridge Company, as provided in the preceding section, (3,) said Republican

River Bridge Company shall deposit with the governor satisfactory surety and guarantees, fully indemnifying the State of Kansas against any loss or losses by reason of the guarantee herein given by the State of Kansas to the United States.

"SEC. 5. This act shall take effect and be in force from and after its passage and publication once in the Leavenworth Evening Bulletin.

"Approved February 26, 1867.

"S. J. CRAWFORD,
"*Governor.*

"I hereby certify that the foregoing is a correct copy of the
43 original enrolled law on file in my office, and that the same was published in the Leavenworth Bulletin March 13, 1867.

"R. A. BARKER,
"*Secretary of State.*"

11. That, in pursuance of said joint resolution of Congress and of said act of the legislature of the State of Kansas, on the 13th day of June, 1868, a patent issued conveying to plaintiff the land in the petition claimed, describing the same as special section 11, town. 12, range 5, together with the other lands mentioned in said resolution, of which patent the following is a copy:

"The United States of America to all to whom these presents shall come greeting:

"Whereas in the joint resolution as approved March 2, 1867, of the Congress of the United States 'for the reduction of the military reservation of Fort Riley, and to grant land for bridge purposes to the State of Kansas,' it is stipulated as follows: 'That the southwestern boundary of the military reservation of Fort Riley, in the State of Kansas, be, and and the same is hereby declared to be, hereafter the channel of Republican River, from its mouth to the point where said river intersects the present western line of said reservation; and the land released from said reservation and lying between the Smoky Hill and Republican Rivers is
hereby granted to the State of Kansas, to aid in the construction
44 of a bridge over Republican River on the public highway leading through the present reservation; but upon the express condition that this grant shall be accepted by the State of Kansas, with a guarantee given by said State, by an act of the legislature thereof, that said bridge shall be kept up and maintained in good condition, and shall be free to the use of the Government of the United States for all transit purposes forever, without tolls or charges; and on such acceptance and guarantee being filed in the office of the Secretary of the Interior, together with the certificate of the governor of Kansas that a good and permanent bridge has been constructed over the said Republican River, it shall be the duty of said Secretary to issue patent for the land hereby granted to the State of Kansas, or to such company as may be authorized by act of the legislature of said State to construct said : Provided, however, That nothing herein contained shall be construed to interfere with any grant of any part of said land heretofore made by the United States;'

"And whereas there has been deposited in the General Land-Office of the United States an order, bearing date 3d January, 1868, from th
Secretary of the Interior for the preparation of a patent to the
45 said Republican River Bridge Company for the lands granted by said resolution, with 'the proviso to the resolution that it shall not be construed to interfere with any grant previously made,' which said order is accompanied by the following-described papers: 1st, by a

certified transcript of the act, approved 26th February, 1867, passed by the legislature of the State of Kansas, accepting the congressional grant aforesaid, with all its conditions; 2d, by the statement, dated 27th December, 1867, under seal from the governor of Kansas, that he had 'examined the bridge constructed by said Republican River Bridge Company over Republican River, on the public highway leading through the Fort Riley military reservation,' and found the same to be a good, complete, and permanent structure, as required by the provisions of said act of the legislature, and, 3d, by the request, bearing date 27th December, 1867, from the said governor to the Secretary of the Interior that he would 'cause a patent for the land described in said joint resolution of Congress to be issued to said Republican River Bridge Company without delay.'

"And whereas there has been deposited in the General Land-Office an official plat of survey, certified, under date 21st May, 1868, by the United States surveyor-general for the State of Kansas, as a correct representation of the survey of that portion of Fort Riley military reservation lying between the Republican and Smoky Hill Rivers, 'upon
46 which said tract is designated as special sections one, three, twelve, and thirteen, in township eleven, south of range five east; special sections ten and eleven, in township twelve south, of range five east; special sections two, four, and five, in township eleven south, of range six east, and special sections six, seven, eight, and nine, in township twelve south, of range six east, in the State of Kansas, containing, in the aggregate, three thousand nine hundred and twenty-two acres and six-hundredths of an acre:'

"Now, know ye, that the United States of America, in consideration of the premises, and in conformity with the joint resolution and order aforesaid, have given and granted, and by these presents do give and grant, subject to the conditions of the aforesaid joint resolution of Congress in favor of the United States, and of non-interference with any other grant which may have been made by the United States prior to said joint resolution, unto the said Republican River Bridge Company, and to their successors and assigns, the tract of land described according to the aforesaid plat, certified by the said surveyor-general, under date May 21, 1868, to have and to hold the said tract, with the appurtenances, unto the said Republican River Bridge Company, and to their successors and assigns, forever, yet upon the express conditions and stipula-
47 tions in the aforesaid joint resolution in regard to the free use forever to the Government of the United States of the said bridge 'for all transit purposes, without tolls or charges,' and that 'nothing herein contained shall be construed to interfere with any grant of any part of said land heretofore made by the United States.'

"In testimony whereof I, Andrew Johnson, President of the United States of America, have caused these letters to be made patent and the seal of the General Land-Office to be hereunto affixed.

"Given under my hand at the city of Washington, this thirteenth day of June, in the year of our Lord one thousand eight hundred and sixty-eight, and of the Independence of the United States the ninety-second.

"By the President:

[SEAL.] "ANDREW JOHNSON,

"By FRANK COWAN, *Secretary.*

"JN. GRANGER,

"*Recorder of the General Land-Office.*

"Recorded vol. 12, pp. 431 to 433."

Which patent is endorsed as follows, to wit:

"Patent—United States to Republican River Bridge Company.

"STATE OF KANSAS,
"*Davis County, ss :*

"This instrument was filed for record on the 3d day of October, A. D. 1868, at 10 o'clock a. m., and duly recorded in Book C of conveyances, at page' 71, '2, & '3.

48 "A. C. SCHNELL, [SEAL.]
"*Register of Deeds.*"

That the land described in defendant's answer, and to which defendant denies the title of the plaintiff, is worth two hundred dollars an acre, and is of the yearly value of three dollars per acre; that said defendant was at the commencement of this suit, and still is, in possession of the land described in the answer, to wit, 532 acres.

12. That on the 12th day of July, A. D. 1867, the defendant caused to be filed for record, in the office of the register of deeds of Davis County, in which said land is situate, a plat, duly executed and acknowledged by defendant, of that portion of the land claimed by plaintiff, which is designated by metes and bounds in the answer of defendant as in possession of defendant and claimed by defendant, by which plat said land was marked as laid out into town-lots as an addition to the town of Junction City, except a strip occupied as a right of way by defendant to a width of fifty feet on each side of its track, and except also a piece of land containing about 33 acres, bounded on the north by 13th street, on the east by Perry street, on the south by the line of an alley running between 7th and 8th streets, on the southwest by the former line of the Fort Riley military reservation, and on the west by Price street, as marked on said plat.

49 13. That defendants, from and after laying out said land as an addition to said town of Junction City, ceased to use the same, (except that portion reserved as a right of way, and except said 33 acres,) for any purpose connected with its business in running and operating its railroad; that it offered said land, except its said right of way and except said reserved 33 acres, for sale, and has sold some of the lots so laid out and platted.

14. That if the joint resolution of July 26th, 1866, is to be construed and held as a grant by Congress to the defendant of said fractional section one, (1,) there had been no other grant by Congress of said land prior to the passage of said joint resolution of March 2d, 1867.

And the court further finds as conclusions of law—

1st. That the joint resolution passed by Congress, (copied above,) approved July 26, 1866, was and must be construed as a grant by Congress to the defendant of the land in controversy, and that upon the issuance of the executive order of the President (above copied) dated July 19, 1867, the legal title to said land vested in defendant and relates back to the date of the passage of said joint resolution of July 26th, 1866; to which conclusion of law the said plaintiff then and there excepted.

JOHN T. MORTON, *Judge.*

50 2. That said act of the legislature of the State of Kansas, approved February 26, 1867, taking effect March 13, 1867, was a valid acceptance by the State of Kansas of the grant made by said joint resolution of Congress of date March 2, 1867; to which conclusion of law the said defendant then and there excepted.

JOHN T. MORTON, *Judge.*

3d. That the joint resolution of Congress entitled "Joint resolution for the reduction of the military reservation of Fort Riley, and to grant land for bridge purposes to the State of Kansas," approved March 2d, 1867, and the patent issued thereon, conveyed to plaintiff all the land mentioned in said resolution and patent, except the land claimed by defendant, which had been previously granted to defendant by the resolution of Congress of July 26, 1866, entitled "A resolution granting the right of way through the military reserves to the Union Pacific Railroad Company and its branches;" to which conclusion of law both the said plaintiff and the said defendant then and there excepted.

JOHN T. MORTON, *Judge.*

4th. That the plaintiff is not entitled to recover in this action, and that judgment should be rendered for the defendant; to which
51 conclusion of law the said plaintiff then and there excepted.

JOHN T. MORTON, *Judge.*

A.

And thereupon the plaintiff filed the following motion for judgment in its favor, in words and figures as follows:

In the district court for Shawnee County, Kansas.

Motion.

THE REPUBLICAN RIVER BRIDGE COMPANY, plain iff,
against
THE KANSAS PACIFIC RAILWAY COMPANY, defendant.

The plaintiff moves the court herein to render judgment in favor of the plaintiff on the facts found by the court.

B. F. STINGFELLOW,
For Plaintiff.

(Endorsed:) Which motion is endorsed as follows, to wit: (A.) Republican River Bridge Company against The Kansas Pacific Railway Company, defendant. Motion for judgment in favor of plaintiff on facts found by court. Filed January 5th, 1872. Hiram McArthur, clerk. B. F. Stringfellow, for plaintiff.

Which motion, being heard, was overruled by the court, and to the overruling of which said motion the plaintiff then and there excepted.

And, on motion of the defendant, it is considered and adjudged
52 by the court that the defendant have judgment upon the findings, and that it go hence without day, and that it recover of and from the said plaintiff its costs in this action expended, taxed at $; and hereof let execution issue; to the rendition of which said judgment the said plaintiff then and there excepted.

And thereupon the plaintiff filed its motion to set aside said judgment and render a judgment in its favor; which motion is, in words and figures, as follows:

of the Fort Riley military reservation, for depot and other purposes, in the bottom, opposite Riley City; also fractional section one, on the
57 west side of said reservation, near Junction City, for the same purposes; and also to restore, from time to time, to the public domain any portion of said military reserve over which the Union Pacific Railroad or any of its branches may pass, and which shall not be required for military purposes: Provided, That the President shall not permit the location of any such railroad or the diminution of any such reserve, in any manner so as to impair its usefulness for military purposes, so long as it shall be required therefor;'

"And whereas it appears by the report of Lieutenant-General W. T. Sherman, commanding the military department of the Missouri, 'that the location of the Union Pacific Railroad through it has been judiciously made, so as not to impair its usefulness for military purposes, and that the 'twenty acres' for a depot, and the fractional section 'one,' on the west side of said reservation, near Junction City, can also be granted the company 'without impairing the usefulness for military purposes of the reservation:' It is therefore ordered by the President that the aforesaid grant, specified in said joint resolution of Congress, be, and the same is hereby, approved; and, by virtue of the aforesaid resolution, there is set apart to the Union Pacific Railroad Company, eastern division, twenty acres of the Fort Riley military reservation, for
58 depot and other purposes, in the bottom opposite Riley City, and fractional section 'one,' on the west side of said reservation, near Junction City, for the same purposes, as designated on a map or survey accompanying letter from the Secretary of the Interior, dated 15th February, 1867, to William J. Palmer, treasurer Union Pacific Railway Company, eastern division, hereto annexed; the aforesaid premises being set apart as aforesaid for the purposes specified by the terms of said joint resolution, and according to its true meaning and effect.

"Witness my hand and the seal of the War Department this 19th day of July, in the year of our Lord one thousand eight hundred and sixty-seven.

"By the President of the United States:

[SEAL.] (Signed) "ANDREW JOHNSON,
"*President.*

(Signed) "EDWIN M. STANTON,
"*Secretary of War.*"

3. That the northern boundary-line of said township 12 south, range 5 east, was surveyed by Frederick Hawn, a deputy surveyor of the United States, in the month of July, 1857, and who established, in conformity to law, landmarks along said line from west to east at the quarter-section corners; and the northeastern and northwestern corners of said fractional section one (1) were established by said surveyor,
59 and monuments erected by him at said corners; that the survey of said Hawn was duly approved by John Caltroun, surveyor-general, August 21, 1857; that said Deputy Surveyor Hawn made regular field-notes of his said survey, which field-notes, with a diagram, were filed in the office of the surveyor-general before the approval of the survey, where they have since remained.

4. That William Weir, jr., deputy surveyor of the United States, run the eastern line of said township in November, 1856, and established, in conformity to law, landmarks along said line from south to north, at the section and quarter-section corners, until he reached the Fort Riley

military reservation, in which he did not put up any monuments or designate his line by any landmarks, and there was no landmarks or monuments of any kind at the northeast corner of the township until the same was established and erected by Deputy Surveyor Hawn, in order to close his survey, which monument, placed by Hawn as aforesaid, became the established northeast corner of the township; that this corner is east of a true line run north by Weir, upon which he made no landmarks, and that all the sections on the north line of said township were surveyed and platted to conform to the line and landmarks run and made by Surveyor Hawn, the east lines of sections one to six, inclusive, bearing east of north, instead of being true north and south lines.

60 5. That Penebacker and Vand'veer, deputy surveyors of the United States, in the autumn of 1857, surveyed and subdivided all of township twelve (12) south, range five (5) east, aforesaid, except that portion which was situate within the Fort Riley military reservation, and established the proper section, quarter-section, and closing corners thereon; and that said Penebacker and Vandeveer, in making their said survey, established the line between sections one (1) and twelve, (12,) to its intersection with the Fort Riley military reservation, the length of said line being fifty-three (53) chains and seventy (70) links; and they also established the line between sections one (1) and two, (2,) to its intersection with the Fort Riley military reservation, the length of said line being forty-one (41) chains and eighty-eight (88) links, and put landmarks at the point of intersection of the south and west lines of said section one (1) with the line of said military reservation; that they made proper field-notes of their said surveys and filed the same in the office of the surveyor-general of Kansas Territory; which surveys, so made by them, were approved September 18th, 1858, by Ward B. Burnett, surveyor-general.

6. That Robert Armstrong, a deputy surveyor of the United States, in the month of March, 1870, surveyed fractional section one, (1,) in township, (12,) range five (5) east, in the Fort Riley military reserva-

61 tion, and established all of the corners thereof, except such as had been established by Hawn, Penebacker, and Vandeveer; that the monuments and landmarks placed by Penebacker and Vandeveer remained, and were found as placed by them, also, the monument erected by Hawn at the northeast corner of the township remained, and was found by said Armstrong as placed by said Hawn; that the landmarks at the northwest corner of said fractional section one, (1,) erected by Hawn, was missing; its place was supplied by Armstrong with another to mark said corner of section one, (1.) Said Armstrong surveyed and closed the line from said northwest corner south 16° 10′ W., thirty-nine chains and sixty-seven links in length to the monument or landmark erected by Penebacker and Vandeveer, on the west line of said section, at its intersection with the line of the Fort Riley military reservation. He also surveyed and established the line twenty-six (26) chains and eighty-eight (88) links in length between sections one (1) and twelve, (12,) from the point of intersection of the line of said military reservation with said sections established by Penebacker and Vandeveer, and the landmarks by them erected, east to the southeast corner of the section upon the line run by Deputy Surveyor Weir in 1856, aforesaid, and thence he ran a direct line, seventy-nine chains and eighty-two links in length, to

62 the monument in the northeast corner of the township, erected by Hawn as aforesaid. That the said Armstrong in making his

said survey was governed and controlled by the field-notes made by Deputy Surveyors Weir and Hawn and Penebacker and Vandeveer, and instructions from the surveyor-general requiring him to be so governed, all of which were furnished him to make said survey. That the field notes of the said Armstrong were returned and filed in the office of the surveyor-general, and were approved by C. W. Babcock, surveyor-general, April 5th, 1870, and that said survey was made in pursuance of directions from the Commissioner of the General Land-Office, and the lines of said fractional section one, (1,) surveyed and established by said Armstrong, are the same lines mentioned and specified in defendant's answer as the exterior lines of fractional section one (1) in the Fort Riley military reservation, and that this is the only fractional section *section* one (1) on the west side of said reserve, near Junction City, and that Junction City is in fact on a part of this same section one, (1,) without the former lines of the reserve.

7. That the said survey by Deputy Surveyor Armstrong was the first and only complete survey of all the lines of said fractional section one, (1.)

63 8. That all of the surveys herein mentioned were duly made, in pursuance of laws of the United States and under the authority and direction of the proper officers of the United States; that the defendant constructed the railroad across said section in the summer and autumn of 1866, and erected its depot, buildings, and shops thereon, and has since continued to operate said road.

9. That on the 2d day of March, 1867, the Congress of the United States adopted and passed the following resolution, which was approved by the President, and took effect on that day:

"*Public resolution, No.* 37.

"Joint resolution for the reduction of the military reservation of Fort Riley, and to grant land for bridge purposes to the State of Kansas.

"Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the southwestern boundary of the military reservation of Fort Riley, in the State of Kansas, be, and the same is hereby, declared to be hereafter the channel of the Republican River from its mouth to the point where said river intersects the present western line of said reservation, and the land released from said reservation, and lying between the Smoky Hill and Republican Rivers is hereby granted to the State of Kansas, to aid in the construction of a bridge over the Republican River, on the public

64 highway leading through the present reservation; but upon the express condition that this grant shall be accepted by the State of Kansas with a guarantee given by said State, by an act of the legislature thereof, that said bridge shall be kept up and maintained in good condition, and shall be free to the use of the Government of the United States for all transit purposes forever, without tolls or charges, and on such acceptance and guarantee being filed in the office of the Secretary of the Interior, together with the certificate of the governor of Kansas that a good and permanent bridge has been constructed over the said Republican River, it shall be the duty of said Secretary to issue patent for the land hereby granted, to the State of Kansas, or to such company as may be authorized by act of the legislature of said State to construct said bridge: Provided, however, that nothing herein contained shall be construed to interfere with any grant of any part of said land heretofore made by the United States.

"Approved March 2d, 1867."

10. That on the 26th day of February, 1867, the following act was passed by the legislature of the State of Kansas, and approved by the governor of said State on that day, and took effect on the 13th day of March, 1867:

"CHAPTER XXXIV.

"*Bridge across the Republican River.*

"An act accepting a certain grant of land from the United States
65 to the State of Kansas for bridge purposes, and authorizing the Republican River Bridge Company to construct such bridge.

"Be it enacted by the legislature of the State of Kansas:

"SECTION 1. That the joint resolution passed by the Congress of the United States at the 39th session thereof, and entitled 'A joint resolution for the reduction of the military reservation of Fort Riley, and to grant land for bridge purposes to the State of Kansas,' be, and the same hereby is, accepted by the State of Kansas upon the terms and conditions therein named, and the guarantee therein required 'that a bridge shall be constructed over the Republican River on the public highway leading through the present Fort Riley military reservation, and that said bridge shall be kept up and maintained in good condition, and shall be free to the use of the Government of the United States and the citizens of the State of Kansas for all transit purposes forever, without tolls or charges,' is hereby given.

"SEC. 2. The Republican River Bridge Company of Davis County, whose certificate of incorporation was, on the 11th day of November, A. D. 1864, filed in the secretary of state's office, is hereby authorized and empowered to proceed under its charter to construct said bridge.

"SEC. 3. It shall be the duty of said Republican Bridge Com-
66 pany to complete said bridge within one year from the date of the passage and approval of this act; and immediately after the completion of said bridge it shall be the duty of said bridge company to notify the governor of this State that such bridge has been completed, whereupon, within ten days after receiving such notice, the governor shall, in person, together with a competent engineer, proceed to examine said bridge; and if, upon such examination, the governor shall find that a good and permanent bridge has been, by said Republican River Bridge Company, constructed over the said Republican River, it shall be his duty, within ten days thereafter, to certify the same to the Secretary of the Interior, which certificate, together with a certified copy of this act, shall be, by the governor, transmitted to the Secretary of the Interior at Washington, D. C., for the purpose of having the same filed in his office. And the governor shall, at the time of transmitting said certificate and copy of this act, also transmit to the Secretary of the Interior a request that he issue patent for the land mentioned and described in the joint resolution of Congress, referred to in the first section of this act to said Republican River Bridge Company.

"SEC. 4. That before the governor shall make request to the
67 Secretary of the Interior to issue patent to said land to said Republican River Bridge Company, as provided in the preceding section, (3,) said Republican River Bridge Company shall deposit with the governor satisfactory surety and guarantees, fully indemnifying the State of Kansas against any loss or losses by reason of the guarantee herein given by the State of Kansas to the United States.

"SEC. 5. This act shall take effect and be in force from and after its passage and publication once in the Leavenworth Evening Bulletin.

"Approved February 26, 1867.

"S. J. CRAWFORD, *Governor.*

"I hereby certify that the foregoing is a correct copy of the original enrolled law on file in my office, and that that same was published in the Leavenworth Bulletin, March 13, 1867.

"R. A. BARKER,
"*Secretary of State.*"

11. That in pursuance of said joint resolution of Congress, and of said act of the legislature of the State of Kansas on the 13th day of June, 1868, a patent issued conveying to plaintiff the land in the petition claimed, describing the same a special section 11, town. 12, range 5, together with the other lands mentioned in said resolution, of which patent the following is a copy:

68 "The United States of America to all to whom these presents shall come, greeting:

"Whereas in the joint resolution, as approved March 2, 1867, of the Congress of the United States, 'for the reduction of the military reservation of Fort Riley and to grant land for bridge purposes to the State of Kansas,' it is stipulated as follows:

"'That the southwestern boundary of the military reservation of Fort Riley, in the State of Kansas, be, and the same is hereby, declared to be hereafter the channel of Republican River, from its mouth to the point where said river intersects the present western line of said reservation; the land released from said reservation and lying between the Smoky Hill and Republican Rivers is hereby granted to the State of Kansas to aid in the construction of a bridge over Republican River, on the public highway leading through the present reservation; but upon the express condition that this grant shall be accepted by the State of Kansas, with a guarantee given by said State, by an act of the legislature thereof, that said bridge shall be kept up and maintained in good condition, and shall be free to the use of the Government of the United States for all transit purposes forever, without tolls or charges; and on such acceptance and guarantee being filed in the office of the Secre-

69 tary of the Interior, together with the certificate of the governor of Kansas that a good and permanent bridge has been constructed over the said Republican River, it shall be the duty of said Secretary to issue patent for the land hereby granted to the State of Kansas, or to such company as may be authorized by act of the legislature of said State to construct said bridge; provided, however, that nothing herein contained shall be construed to interfere with any grant of any part of said land heretofore made by the United States;'

"And whereas there has been deposited in the General Land-Office of the United States an order, bearing date 3d January, 1868, from the Secretary of the Interior, for the preparation of a patent to the said Republican River Bridge Company, for the lands granted by said resolution, with 'the proviso to the resolution that it shall not be construed to interfere with any grant previously made,' which said order is accompanied by the following-described papers:

"1st. By a certified transcript of the act approved 26th February, 1867, passed by the legislature of the State of Kansas, 'accepting the congressional grant aforesaid, with all its conditions.

"2nd. By the statement, dated 27th December, 1867, under seal from the governor of Kansas, that he had 'examined the bridge constructed by said Republican River Bridge Company, over Republican River,
70 on the public highway leading through the Fort Riley military reservation,' and 'found the same to be a good, complete, and permanent structure as required by the provisions of said act' of the legislature; and,

"3d. By the request, bearing date 27th December, 1867, from the said governor to the Secretary of the Interior, that he would 'cause' a patent for the land described in said joint resolution of Congress to be issued to said Republican River Bridge Company without delay;

"And whereas there has been deposited in the General Land-Office an official plat of survey, certified, under date 21st May, 1868, by the United States surveyor-general for the State of Kansas, as 'a correct representation of the survey of that portion of Fort Riley military reservation lying between the Republican and Smoky Hill rivers,' upon which said tract is designated as special sections one, three, twelve, and thirteen, in township eleven south, of range five east; special sections ten and eleven, in township twelve south, of range five east; special sections two, four, and five, in township eleven south, of range six east; and special sections six, seven, eight, and nine, in township twelve south, of range six east, in the State of Kansas; containing in the aggregate three thousand nine hundred and twenty-two acres and six hundredths of an acre.

"Now know ye, that the United States of America, in consider-
71 ation of the premises, and in conformity with the joint resolution and order aforesaid, have given and granted, and by these presents do give and grant, subject to the conditions of the aforesaid joint resolution of Congress in favor of the United States, and of non-interference with any other grant which may have been made by the United States prior to said joint resolution, unto the said Republican River Bridge Company, and to their successors and assigns, the tract of land described according to the aforesaid plat certified by the said surveyor-general under date May 21, 1868: to have and to hold the said tract, with the appurtenances, unto the said Republican River Bridge Company, and to their successors and assigns, forever, yet upon the express conditions and stipulations in the aforesaid joint resolution in regard to the free use, forever, to the Government of the United States of the said bridge 'for all transit purposes, without tolls or charges,' and that 'nothing herein contained shall be construed to interfere with any grant of any part of said land heretofore made by the United States.'

"In testimony whereof I, Andrew Johnson, President of the United States of America, have caused these letters to be made patent, and the seal of the General Land-Office to be hereunto affixed.

72 "Given under my hand, at the city of Washington, this thirteenth day of June, in the year of our Lord one thousand eight hundred and sixty-eight, and of the Independence of the United States the ninety-second.

"By the President:

[SEAL.]

"ANDREW JOHNSON,
"By FRANK COWAN, *Secretary.*
"JOHN GRANGER,
"*Recorder of the General Land-Office.*

"Recorded vol. 12, pp. 431 to 433.

(Endorsed:) Which patent is endorsed as follows, to wit: "Patent United States, to Republican River Bridge Company.

"STATE OF KANSAS,
"*Davis County, ss:*
"This instrument was filed for record on the 3d day of October, A. D. 1868, at 10 o'clock a. m., and duly in book C of conveyances, at page, 71, '2, and '3.
[SEAL.]
"A. C. SCHNELL,
"*Register of Deeds.*"

That the land described in defendant's answer, and to which defendant denies the title of the plaintiff, is worth two hundred dollars an acre, and is of the yearly value of three dollars per acre; that said defendant was at the commencement of this suit, and still is, in possesson of the land described in the answer, to wit, 532 acres.

12. That on the 12th day of July, A. D. 1867, the defendant caused to be filed for record in the office of the register of deeds of Davis
73 County, in which said land is situated, a plat, duly executed and acknowledged by defendant, of that portion of the land claimed by plaintiff, which is designated by metes and bounds in the answer of the defendant, as in possession of defendant, and claimed by defendant, by which plat said land was marked as laid out into town lots, as an addition to the town of Junction City, except a strip occupied as a right of way by defendant, to a width of fifty feet on each side of its track, and except, also, a piece of land containing about 33 acres, bounded on the north by 13th street, on the east by Perry street, on the south by the line of an alley running between 7th and 8th streets, on the southwest by the former line of the Fort Riley military reservation, and on the west by Price street, as marked on said plat.

13. That defendants, from and after laying out said land as an addition to said town of Junction City, ceased to use the same (except that portion reserved as a right of way and except said 33 acres) for any purpose connected with its business in running and operating its railroad: that it offered said land, except its said right of way, and except said reserved 33 acres, for sale, and has sold some of the lots so laid out and platted.

14. That if the joint resolution of July 26th, 1866, is to be construed and held as a grant by Congress to the defendant of said fraction-
74 al section one, (1,) there had been no other grant Congress of said land prior to the passage of said joint resolution of March 2d, 1867.

And thereupon the court doth declare its conclusions of law in words and figures as follows, to wit:

1. That the joint resolution passed by Congress, (copied above,) approved July 26, 1866, was and must be construed as a grant by Congress to the defendant of the land in controversy, and that upon the issuance of the executive order of the President, (above copied,) dated July 19th, 1867, the legal title to said land vested in defendant, and relates back to the date of the passage of said joint resolution of July 26, 1866; to which conclusion of law the said plaintiff then and there excepted.

JOHN T. MORTON, *Judge.*

2. That said act of the legislature of the State of Kansas, approved February 26th, 1867, taking effect March 13, 1867, was a valid acceptance by the State of Kansas of the grant made by said joint resolution of Congress, of date March 2d, 1867; to which conclusion of law the said defendant then and there excepted.

JOHN T. MORTON, *Judge.*

3. That the joint resolution of Congress entitled "Joint resolution for the reduction of military reservation of Fort Riley, and to grant land for bridge purposes to the State of Kansas," approved March 2d, 1867, and the patent issued thereon, conveyed to plaintiff all the
75 land mentioned in said resolution and patent, except the land claimed by defendant, which had been previously granted to defendant by the resolution of Congress of July 26, 1866, entitled "A resolution granting the right of way through the military reserves to the Union Pacific Railroad Company, and its branches;" to which conclusion of law both the said plaintiff and the said defendant then and there excepted.

JOHN T. MORTON, *Judge.*

4. That the plaintiff is not entitled to recovery in this action, and that judgment should be rendered for the defendant; to which conclusion of law the said plaintiff then and there excepted.

JOHN T. MORTON, *Judge.*

To which opinion of the court, in declaring its first, third, and fourth conclusions of law, the plaintiff at the time excepted. The plaintiff then filed its motion for a judgment in its favor, on the facts as found by the court, in words and figures as follows:

A.

THE REPUBLICAN RIVER BRIDGE COMPANY, plaintiff
against
THE KANSAS PACIFIC RAILWAY COMPANY, defendant.

In the district court for Shawnee Co., Kans.

76 The plaintiff moves the court herein to render judgment in favor of the plaintiff, on the facts found by the court.

B. F. STRINGFELLOW,
For Plaintiff.

Which motion is endorsed as follows: A. Republican River Bridge Company, plaintiff, against Kansas Pacific Railway Company, defendant. Motion for judgment in favor of plaintiff on facts found by court. Filed January 5th, 1872. Hiram McArthur, clerk. B. F. Stringfellow, for plaintiff.

Which motion, being heard by the court, is overruled; to which opinion of the court in overruling said motion the plaintiff excepts. Judgment was thereon rendered by the court in favor of defendant; to which opinion of the court in rendering judgment in favor of the defendant the plaintiff excepts.

And thereupon the plaintiff files here its motion to set aside said judgment, and to render judgment for plaintiff, in words and figures as follows, to wit:

"STATE OF KANSAS,
"*Davis County, ss:*

"This instrument was filed for record on the 3d day of October, A. D. 1868, at 10 o'clock a. m., and duly in book C of conveyances, at page, 71, '2, and '3.

[SEAL.] "A. C. SCHNELL,
"*Register of Deeds.*"

That the land described in defendant's answer, and to which defendant denies the title of the plaintiff, is worth two hundred dollars an acre, and is of the yearly value of three dollars per acre; that said defendant was at the commencement of this suit, and still is, in possesson of the land described in the answer, to wit, 532 acres.

12. That on the 12th day of July, A. D. 1867, the defendant caused to be filed for record in the office of the register of deeds of Davis
73 County, in which said land is situated, a plat, duly executed and acknowledged by defendant, of that portion of the land claimed by plaintiff, which is designated by metes and bounds in the answer of the defendant, as in possession of defendant, and claimed by defendant, by which plat said land was marked as laid out into town lots, as an addition to the town of Junction City, except a strip occupied as a right of way by defendant, to a width of fifty feet on each side of its track, and except, also, a piece of land containing about 33 acres, bounded on the north by 13th street, on the east by Perry street, on the south by the line of an alley running between 7th and 8th streets, on the southwest by the former line of the Fort Riley military reservation, and on the west by Price street, as marked on said plat.

13. That defendants, from and after laying out said land as an addition to said town of Junction City, ceased to use the same (except that portion reserved as a right of way and except said 33 acres) for any purpose connected with its business in running and operating its railroad: that it offered said land, except its said right of way, and except said reserved 33 acres, for sale, and has sold some of the lots so laid out and platted.

14. That if the joint resolution of July 26th, 1866, is to be construed and held as a grant by Congress to the defendant of said fraction-
74 al section one, (1,) there had been no other grant Congress of said land prior to the passage of said joint resolution of March 2d, 1867.

And thereupon the court doth declare its conclusions of law in words and figures as follows, to wit:

1. That the joint resolution passed by Congress, (copied above,) approved July 26, 1866, was and must be construed as a grant by Congress to the defendant of the land in controversy, and that upon the issuance of the executive order of the President, (above copied,) dated July 19th, 1867, the legal title to said land vested in defendant, and relates back to the date of the passage of said joint resolution of July 26, 1866; to which conclusion of law the said plaintiff then and there excepted.

JOHN T. MORTON, *Judge.*

2. That said act of the legislature of the State of Kansas, approved February 26th, 1867, taking effect March 13, 1867, was a valid acceptance by the State of Kansas of the grant made by said joint resolution of Congress, of date March 2d, 1867; to which conclusion of law the said defendant then and there excepted.

JOHN T. MORTON, *Judge.*

3. That the joint resolution of Congress entitled "Joint resolution for the reduction of military reservation of Fort Riley, and to grant land for bridge purposes to the State of Kansas," approved March 2d, 1867, and the patent issued thereon, conveyed to plaintiff all the
75 land mentioned in said resolution and patent, except the land claimed by defendant, which had been previously granted to defendant by the resolution of Congress of July 26, 1866, entitled "A resolution granting the right of way through the military reserves to the Union Pacific Railroad Company, and its branches;" to which conclusion of law both the said plaintiff and the said defendant then and there excepted.

JOHN T. MORTON, *Judge.*

4. That the plaintiff is not entitled to recovery in this action, and that judgment should be rendered for the defendant; to which conclusion of law the said plaintiff then and there excepted.

JOHN T. MORTON, *Judge.*

To which opinion of the court, in declaring its first, third, and fourth conclusions of law, the plaintiff at the time excepted. The plaintiff then filed its motion for a judgment in its favor, on the facts as found by the court, in words and figures as follows:

A.

THE REPUBLICAN RIVER BRIDGE COMPANY, plaintiff
against
THE KANSAS PACIFIC RAILWAY COMPANY, defendant.

In the district court for Shawnee Co., Kans.

76 The plaintiff moves the court herein to render judgment in favor of the plaintiff, on the facts found by the court.

B. F. STRINGFELLOW,
For Plaintiff.

Which motion is endorsed as follows: A. Republican River Bridge Company, plaintiff, against Kansas Pacific Railway Company, defendant. Motion for judgment in favor of plaintiff on facts found by court. Filed January 5th, 1872. Hiram McArthur, clerk. B. F. Stringfellow, for plaintiff.

Which motion, being heard by the court, is overruled; to which opinion of the court in overruling said motion the plaintiff excepts. Judgment was thereon rendered by the court in favor of defendant; to which opinion of the court in rendering judgment in favor of the defendant the plaintiff excepts.

And thereupon the plaintiff files here its motion to set aside said judgment, and to render judgment for plaintiff, in words and figures as follows, to wit:

B.

In the district court for Shawnee County, Kansas.

THE REPUBLICAN RIVER BRIDGE COMPANY
against
THE KANSAS PACIFIC RAILWAY COMPANY, DEfendant.

77 The plaintiff moves the court to set aside the judgment herein rendered, and to render judgment in favor of the plaintiff—

1. Because the judgment is against law.
2. Because the judgment ought to be for the plaintiff on the facts found by the court.
3. Because the court erred in its conclusions of law on the facts found by the court.

B. F. STRINGFELLOW,
For Plaintiff.

Which motion is endorsed as follows: B. Republican River Bridge Company, plaintiff, against Kansas Pacific Railway Company, defendant. Motion to set aside judgment and to render judg't for plaintiff. Filed January 5, 1872. Hiram McArthur, clerk. B. F. Stringfellow, for plaintiff.

Which motion, being heard by the court, is overruled; to which opinion of the court in overruling said motion the plaintiff excepts, and prays that this its bill of exceptions be allowed and signed and sealed by the court, which is done and made a part of the record this fifth day of January, A. D. 1872.

JOHN T. MORTON, *Judge.*

Which bill of exceptions is endorsed as follows, to wit: Republican River Bridge Company vs. K. P. R. W. Co. Bill of exceptions.
78 Filed January 5th, 1872. Hiram McArthur, clerk.

STATE OF KANSAS,
County of Shawnee, ss:

I, Hiram McArthur, clerk of the district court in and for said county of Shawnee, do hereby certify that the above and foregoing is a true and correct copy of all the pleadings and papers filed, and a true and complete transcript of the record in the case of the Republican River Bridge Company vs. The Kansas Pacific Railway Company, as the same now remains on file and of record in my office.

Witness my hand and the seal of said court affixed at my office, in the city of Topeka, this 11th day of January, A. D. 1872.

HIRAM McARTHUR, *Clerk.*
By ROBLEY E. HELLER, *D. C.*

And be it remembered that afterwards, to wit, on the 13th day of February, 1872, and at the regular term of said supreme court, the following proceedings were had in this case, to wit:

Journal entry.

THE REPUBLICAN RIVER BRIDGE COMPANY
vs.
THE KANSAS PACIFIC RAILWAY COMPANY. } 840. Journal C.

79 This cause came on to be heard on petition in error, and tran-

script of the record of the district court of Shawnee County, and was argued by B. F. Stringfellow, esq., counsel for plaintiff in error, and taken under advisement by the court.

Ordered that court adjourn till 9 a. m. to-morrow.

SAMUEL A. KINGMAN,
Chief-Justice.

And afterwards, to wit, on the 15th day of January, 1874, and at the regular term of said supreme court for January, 1874, the following proceedings were had in said case, to wit:

Judgment entry.

THE REPUBLICAN RIVER BRIDGE COMPANY
vs.
THE KANSAS PACIFIC RAILWAY COMPANY. } No. 840. Journal D.

This cause came on for decision, and thereupon it is ordered and adjudged that the judgment of the court below be affirmed with costs; and hereof let execution issue. Kingman, C. J., delivered the opinion of the court—all the justices concurring.

Ordered that court adjourn till 9 o'clock a. m. to-morrow.

80 And thereupon the following syllabus and opinion was delivered in said cause by the court per Kingman, C. J.:

THE REPUBLICAN RIVER BRIDGE COMPANY
vs.
THE KANSAS PACIFIC RAILWAY COMPANY. } Error from Shawnee County affirmed.

SYLLABUS.

By the court—KINGMAN, *C. J.*

The joint resolution of Congress approved July 26th, 1866, authorizing the President, among other things, "to set apart to the Union Pacific Railroad Company, eastern division, twenty acres of the Fort Riley reservation, for depot and other purposes, in the bottom opposite Riley City; also fractional section 'one' on the west side of said reservation, near Junction City, for the same purposes," with a proviso that the President should not so do so as in any manner to impair the usefulness of the reserve for military purposes, is a grant of the land, dependent upon the favorable judgment and action of the President therein; and when the President by executive order set apart the land, the title of the railway company thereto became absolute.

All the justices concurring.

81 *Opinion.*

By the court—KINGMAN, *C. J.*

This is an action for the recovery of certain real estate, brought by the plaintiff in error against the defendant in error. A jury was waived, and the case was tried by the court. Special findings of facts and conclusions of law were made by the court, and judgment was rendered for the defendant. To the findings of fact no exception was taken, so that

under our law the facts so found must be taken as true. To each of the conclusions of law the plaintiff in error excepted, and also moved for judgment on the facts found.

The land in controversy has become valuable, and is described by plaintiff in error as special section 11, in township 12 south, of range 5 east, in Davis County, Kansas, and by the defendant in error as fractional section 1, in township 12 south, of range 5 east, containing 532 acres. It is not important to state the causes for the varient descriptions, for the land is identified as being the land in controversy by the facts found. The plaintiff holds under a patent from the United States; the defendant under an alleged grant to itself, made before the plaintiff had any title. The defendant claims that it became the owner of the land by the joint resolution of Congress approved July 26th, 1866, and the subsequent action of the President on the 19th day of July, 1867.

The joint resolution is as follows:

82 "That, subject to approval by the President, the right of way, one hundred feet in width, is hereby granted to the Union Pacific Railroad Company and the companies constructing the branch roads connecting therewith, for the construction and operation of their roads over and upon all military reserves through which the same may pass; and the President is hereby authorized to set apart to the Union Pacific Railway Company, eastern division, twenty acres of the Fort Riley military reservation, for depot and other purposes, in the bottom opposite Riley City; also fractional section 'one,' on the west side of said reservation, near Junction City, for the same purposes; and also to restore from time to time to the public domain any portion of said military reserve over which the Union Pacific Railroad or any of its branches may pass, and which shall not be required for military purposes: Provided, That the President shall not permit the location of any such railroad, or the diminution of any such reserve in any manner so as to impair its usefulness for military purposes, so long as it shall be required therefor." (14 U. S. Stat. at Large, 367.)

In pursuance of said joint resolution, the President did, on the 19th day of July, 1867, by an executive order of that date, approve of "the aforesaid grant specified in said joint resolution," and did set apart to

83 the Union Pacific Railway Company, eastern division, (now known by the name of the Kansas Pacific Railway Company,) fractional section 1, township 12 south, of range 5 east, and that there was attached to said order a map showing the lands described therein. The joint resolution quoted, and the executive order referred to, constitute the defendant's title. The patent of the plaintiff bears date June 13th, 1868; but plaintiff claims that his right dates from the passage of a joint resolution of Congress approved March 2d, 1867, after the joint resolution under which defendant claims was adopted, but before the executive order was made. This joint resolution of March 2nd, 1867, covers the land in controversy, and is as follows:

"That the southwestern boundary of the military reservation of Fort Riley, in the State of Kansas, be, and the same is hereby, declared to be hereafter the channel of the Republican River from its mouth to the point where said river intersects the present western line of said reservation, and the land released from said reservation, and lying between the Smoky Hill and Republican Rivers, is hereby granted to the State of Kansas, to aid in the construction of a bridge over the Republican River, on the public highway leading through the present reservation; but upon the express condition that this grant shall be accepted by the State of Kansas, with a guarantee given by said State, by an act of the legis-

lature thereof, that said bridge shall be kept up and maintained
84 in good condition, and shall be free to the use of the Government of the United States for all transit purposes forever, without tolls or charges; and on such acceptance and guarantee being filed in the office of the Secretary of the Interior, together with the certificate of the governor of Kansas that a good and permanent bridge has been constructed over the said Republican River, it shall be the duty of said Secretary to issue patent for the land hereby granted to the State of Kansas, or to such company as may be authorized by act of the legislature of said State to construct said bridge: Provided, however, that nothing herein contained shall be construed to interfere with any grant of any part of said land heretofore made by the United States." (14 U. S. Statutes at Large, 573.)

On the 26th day of February, four days before this joint resolution was adopted, the State of Kansas passed a law accepting the grant upon the terms therein named, and with the guarantee therein required, and authorized the Republican River Bridge Company to construct the bridge and receive the land mentioned. The company built the bridge, made the necessary proofs thereof, and received the patent for the land.

It will be convenient to see, first, what is the true meaning of the joint resolution of July 26th, 1866. If that resolution made a grant of the land, whether it was absolute or upon condition, or that would
85 become absolute upon any contingency, then that fact must necessarily end the case; for if it was a grant of any kind, then it was excepted by the proviso from the land granted to the State by the joint resolution of March 2d, 1867. It is a recognized rule that grants of this description are strictly construed against the grantees. (Dubuque and Pacific Railway Company vs. Litchfield; 23 Howard, 66.) That is, the language of the law must receive such a construction, if practicable, as to effect the intention of the grantor; but, if the words are ambiguous, the true rule is to construe them most strongly against the grantee. (Railroad Company vs. Rice, 1 Black, 360.) Another rule is that a statute should be so construed that effect be given, if possible, to every clause and section of it. The resolution, then, must be held to be a grant of the land in controversy, or that part of it which treated of this land has no effect whatever. The action of the President might confirm and make certain the right; but, unless the right first emanated from Congress, his acts would confer nothing, for the President of the United States has no power to dispose of the lands of the United States in any case, unless under the provision of law, and then the law is the source of the right, not the Executive action. Whatever right the defendant has or could have obtained has its source in the joint resolution, and must be dependent upon it for its validity. It is unquestionably
86 true that the defendant's title was, by the terms of the resolution, made dependant upon thex Eecutive action, and till he acted no title vested in defendant; but the President's power to act was derived from the law. The court cannot ignore that part of the resolution that gives some right to the defendant in this land. It matters little, as far as this action is concerned, whether this right was perfect at the time, or was dependent upon some contingency or condition in the future. In any event, if there ever could be any title grow out of the resolution and the action of the President, then this makes it a grant and brings it within the exception of the proviso of the joint resolution granting the land to the State. Taking the resolution and the proviso together, it seems to us that the fair reading is, that it is a grant of the land in controversy, dependent upon the determination of

the President as to whether the same would impair the usefulness of the reserve for military purposes, and this seems to be the interpretation of it by the President in his order, which seems wholly based upon the resolution; and the report of General Sherman that the fractional section one "can also be granted the company without impairing the usefulness for military purposes of the reservation." Even if the right was dependent upon the Executive will, without reference to any existing facts, so that it was a mere matter of fancy whether he
87 would sanction it or not, still, when he made his order, we think it gave to defendant a complete title to the land. If this is so, then some right, conditional in its character, passed to the defendant by the resolution.

It is insisted that the terms of the resolution do not grant the land in fee-simple, but as a mere easement thereon, for uses proper to the purposes of defendant as a railroad corporation, and that the use of 500 acres of the land for other than railroad uses has forfeited the easement granted in the land. This would be a strained construction of the language used, and inconsistent with the general policy of Congress. After giving the right of way, then 20 acres are given for depot and other purposes, and then near by this fractional section one containing 532 acres is set apart to the defendant for the same purposes. We cannot say that the other purposes meant anything less than the right of defendant to put the land to such uses as would be most to its advantage. It certainly would not be good policy to have held so large a body of land, so situated and as valuable as this, from occupation and use; nor would it have been consistent with the legislation of Congress, in its grants of land to railroad corporations, that these companies should become the holders of large tracts of land, and hold them against the occupation of citizens. Indeed, in the grant to this company of land to aid in the building of its road, it is pro-
88 vided that the granted lands, not sold within three years after the completion of the road, shall be subject to entry under the preemption laws.

It is further insisted that the words "set apart" in the resolution do not imply a grant. Taken by themselves, that is no doubt true; but as used in their connection, they show that a part of the public domain was included in a reservation for military purposes, which the President was authorized to separate from the rest of the reservation and set apart to the use of the defendant. No form of words is necessary to make a grant. It seems that not only the President and the Secretary of War, a great lawyer, entertained the opinion that this resolution was a grant of the land, but that Congress must have understood it in the same way; for at the next session it excepted from the land granted to the State, and now claimed by the plaintiff, "any grant of any part of said land heretofore made by the United States." There was no grant of this land unless this resolution made one to the defendant. This conclusion disposes of the case, and renders it unnecessary to consider another question raised on the title of plaintiff; and that is whether the acceptance of the grant made in the joint resolution of March 2d, 1867, by the legislature of Kansas, four days before the resolution passed Congress, was such an acceptance and guarantee as the resolution
89 required before any right attached, and what effect the issuance of the patent had on that irregularity. The judgment must be affirmed. All the justices concurring.

STATE OF KANSAS,
Supreme Court, ss:

I, Abram Hammatt, clerk of said court, do hereby certify that the above and foregoing is a true and correct transcript of the record of all the pleadings, exhibits, proceedings, orders, and judgments, together with the writ of error, supersedias, bond, citation, and certificate of value, in the case wherein the Republican River Bridge Company is plaintiff in error, and the Kansas Pacific Railway Company is defendant in error, as the same appears on file and of record in my office.

Witness my hand and the seal of said hereto affixed at my office, in Topeka, Kansas, this sixth day of February, A. D. 1874.

[SEAL.] A. HAMMATT,
Clerk of the Supreme Court of the State of Kansas.

(Indorsement on cover:) No. 154. The Republican River Bridge Company, plaintiff in error, vs. The Kansas Pacific Railway Company. Kansas sup. court. Filed 27th February, 1874.

REC. 154—4

O

Supreme Court of the United States

No. 154.

THE REPUBLICAN RIVER BRIDGE COMPANY,
Plaintiff in Error,

AGAINST

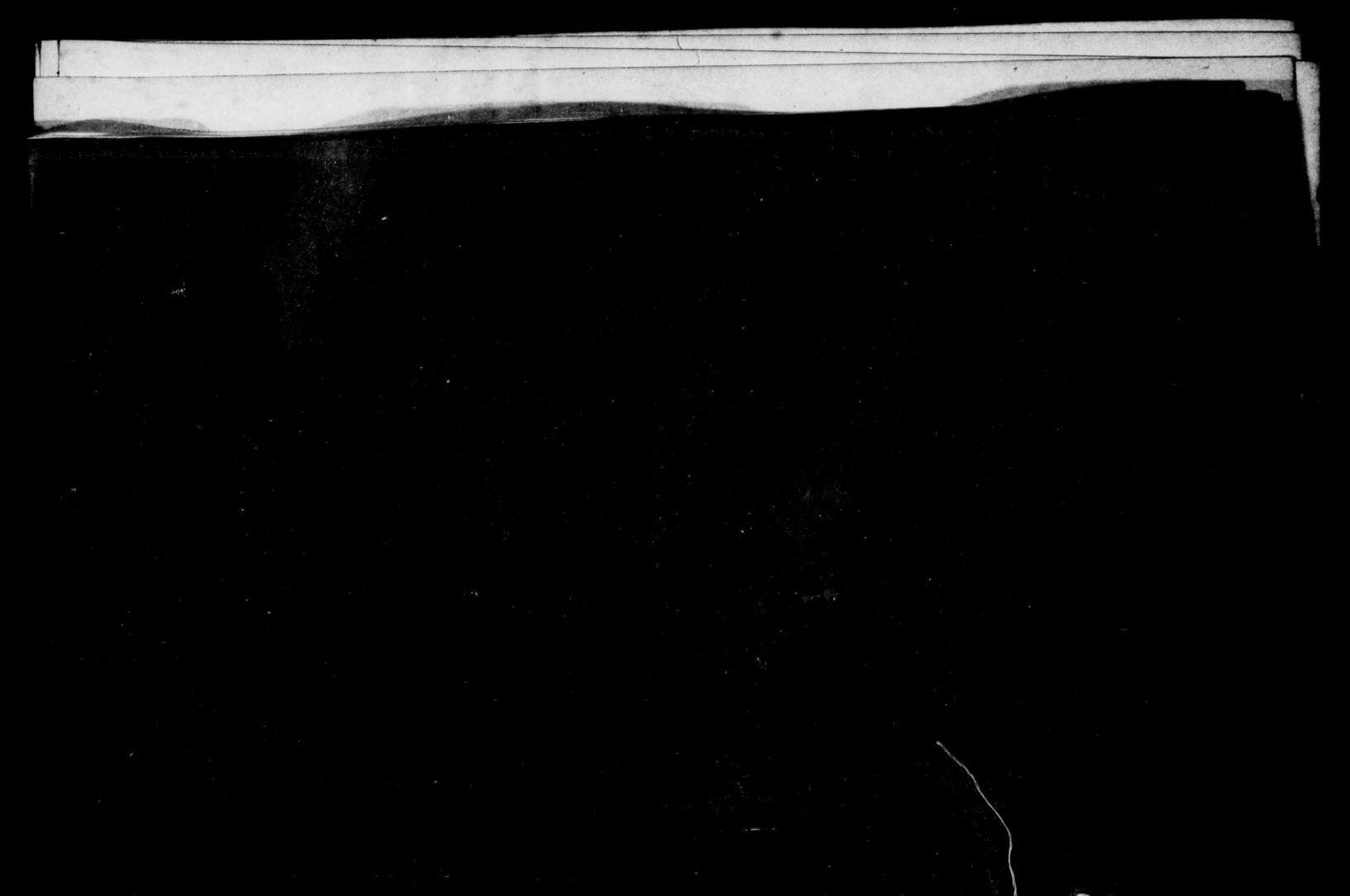
THE KANSAS PACIFIC RAILWAY COMPANY,
Defendant in Error.

Brief of Facts and Argument

OF

B. F. STRINGFELLOW,

For Plaintiff in Error.



IN THE

Supreme Court of the United States

OCTOBER TERM, 1875.

THE REPUBLICAN RIVER BRIDGE COMPANY, *Plaintiff*,

AGAINST

THE KANSAS PACIFIC RAILWAY COMPANY, *Defendant*.

Error to the Supreme Court of the State of Kansas.

B. F. STRINGFELLOW, FOR PLAINTIFF.

STATEMENT OF CASE.

This was an action in the nature of ejectment under the Kansas code brought by Plaintiff in error against Defendant in error in the District Court for Davis County in said State.

The Judge being disqualified to try the case, a change of venue was awarded, by consent of both parties, to the District Court of Shawnee County.

In the latter Court the issues were made and trial had.

Plaintiff claimed to be entitled to the possession of a tract of land described as "Special Section Eleven, in Township Twelve, South, in Range Five, East." See petition p. 6, of printed record.

Defendant, in its final amended answer, denied possession of part, and denied title of Plaintiff to remainder of the land described in the petition. P. 12, of printed record.

The first formal trial was had at the June term, 1870. Under the Statute, a new trial was granted at same term. P. 10-11, of printed record.

The second and final trial in the District Court was had at the June term, 1871.

This trial was by the Court, both parties consenting, and under the Statute. The Court was requested to find separately its conclusions of fact and of law. P. 12, of printed record.

The cause was taken under advisement by the Court, and, at the December term, 1871, on the 5th of January, 1872, the Court rendered its finding of its conclusions of fact and of law. See p. 13, of printed record, and *post*.

The Plaintiff at the time excepted to the 1st, 3d and 4th conclusions of law, as ruled by the Court. P. 20-21.

Plaintiff then filed a motion for judgment in its favor on the facts found by the Court.

This motion was overruled and exceptions taken. P. 21, of printed record.

Defendant then moved for and the Court rendered judgment in its favor. P. 21, of printed record.

To this judgment Plaintiff excepted.

Plaintiff then moved to set aside this judgment and for judgment in its favor.

This motion was overruled and exceptions taken. P. 22, of printed record.

Plaintiff then filed its bill of exceptions, reciting the proceedings on the trial and on the several motions thereafter made, and noting the exceptions above named, already noted on the record, which was allowed and signed by the Judge. P. 22, of printed record and following.

The case was then taken to the Supreme Court of the State of Kansas by writ of error.

In this latter Court, errors were duly assigned and the cause submitted to the Court at the February term, 1872.

It was taken under advisement and so held until the Jan-

uary term, 1874, when judgment was rendered affirming the judgment of the District Court. See p. 33, of printed record.

It appearing that the subject matter of the litigation was of greater value than two thousand five hundred dollars, and that in the rendition of said judgment there was drawn in question the construction of the Statutes of the United States and the decision of the State Supreme Court was against the validity of the right and title set up and claimed under such Statutes, the case was brought to this Court by writ of error.

As the only questions in the case are those which are presented by the facts specifically found by the District Court, its conclusions of law from the facts so found, and the judgment of the Supreme Court affirming the judgment of the District Court, they are here given in full. The findings of fact will be found on printed record, p. 13 to 21, inclusive, and the decision of the Supreme Court on p. 33, of printed records.

FACTS FOUND BY DISTRICT COURT.

THE REPUBLICAN RIVER BRIDGE COMPANY, *Plaintiff*,

AGAINST

THE KANSAS PACIFIC RAILWAY COMPANY, *Defendant*.

This cause coming on for trial, and both parties waiving a jury, the issues joined are tried by the Court without the intervention of a jury, and both Plaintiff and Defendant requesting of the Court separate findings of fact and of law, the Court, after hearing the evidence and the arguments of counsel, finds, as conclusions of fact,—

1st. That the Congress of the United States adopted a joint resolution, approved July 26th, 1866, entitled, "A resolution granting the right of way through military reserves to the Union Pacific Railroad Company and its branches," of which the following is a copy:

[No. 85.]

A Resolution Granting the Right of Way through Military Reserves to the Union Pacific Railroad Company and its Branches.

"*Resolved*, By the Senate and House of Representatives

of the United States of America, in Congress assembled, that, subject to approval by the President, the right of way, one hundred feet in width, is hereby granted to the Union Pacific Railroad Company, and the companies constructing the branch roads connecting therewith, for the construction and operation of their roads over and upon all military reserves through which the same may pass; and the President is hereby authorized to set apart to the Union Pacific Railway Company, Eastern Division, twenty acres of the Fort Riley Military Reservation, for depot and other purposes, in the bottom opposite Riley City; also, fractional section 'one' on the west side of said reservation near Junction City, for the same purposes; and also, to restore, from time to time, to the public domain any portion of said military reserve over which the Union Pacific Railroad or any of its branches may pass, and which shall not be required for military purposes; *provided*, that the President shall not permit the location of any such railroad or the diminution of any such reserve in any manner so as to impair its usefulness for military purposes, as long as it shall be required therefor.

"Approved, July 26th, 1866."

2d. That, in pursuance of said joint resolution, the President of the United States did, on the 19th day of July, A. D. 1867, by an executive order of that date, approve of "the aforesaid grant specified in said joint resolution," and did set apart to the Union Pacific Railway Company, Eastern Division, (now known by the name of the Kansas Pacific Railway Company,) the Defendant in this action, fractional section one (1), specified in said joint resolution, which fractional section one (1) is in township twelve (12), south, range five (5), east, and is parcel of the land described in the Plaintiff's petition, and is the land described in the Defendant's answer, for which the Defendant defends and denies the title of the Plaintiff, and that there was attached to the said order of the President a map, to which reference was by said order made, which map substantially designated said lands so set apart to said railway company as fractional section one (1), in township twelve (12), south, range five (5), east, which map was a copy of a map accompanying a letter from the Secretary of the Interior, of February 15th, 1867, to the Treasurer of

the Defendant, and of which executive order of the President the following is a copy:

"CITY OF WASHINGTON, DISTRICT OF COLUMBIA.

"TO ALL WHOM IT MAY CONCERN:

"WHEREAS, By a joint resolution, approved July 26th, 1866, it was resolved by Congress as follows: "That, subject to approval by the President, the right of way, one hundred feet in width, is hereby granted to the Union Pacific Railroad Company, and the companies constructing the branch roads connecting therewith, for the construction and operation of their roads over and upon all military reserves through which the same may pass; and the President is hereby authorized to set apart to the Union Pacific Railroad Company, Eastern Division, twenty acres of the Fort Riley Military Reservation for depot and other purposes, in the bottom opposite Riley City; also, fractional section one on the west side of said reservation, near Junction City, for the same purposes; and also, to restore, from time to time, to the public domain any portion of said military reserve over which the Union Pacific Railroad or any of its branches may pass, and which shall not be required for military purposes; *provided*, that the President shall not permit the location of any such railroad or the diminution of any such reserve in any manner so as to impair its usefulness for military purposes, so long as it shall be required therefor.

"AND, WHEREAS, It appears by the report of Lieutenant-General W. T. Sherman, commanding the Military Division of the Missouri, that the location of the Union Pacific Railroad through it has been judiciously made, so as not to impair its usefulness for military purposes, and that the 'twenty acres' chosen for a depot, and the fractional section 'one' on the west side of said reservation, near Junction City, can also be granted the Company without impairing the usefulness for military purposes of the reservation.

"It is, therefore, ordered by the President that the aforesaid grant, specified in said joint resolution of Congress be, and the same is hereby, approved.

"And, by virtue of the aforesaid resolution, there is set apart to the Union Pacific Railway Company, Eastern Divis-

ion, twenty acres of the Fort Riley Military Reservation, for depot and other purposes, in the bottom opposite Riley City, and fractional section 'one' on the west side of said reservation, near Junction City, for the same purposes as designated on a map or survey accompanying letter from the Secretary of the Interior, dated 15th February, 1867, to William J. Palmer, Treasurer Union Pacific Railway Company, Eastern Division, hereto annexed, the aforesaid premises being set apart as aforesaid for the purposes specified by the terms of said joint resolution, and according to its true meaning and effect.

"WITNESS, my hand and the seal of the War Department
[SEAL.] this 19th day of July, in the year of our Lord one thousand eight hundred and sixty-seven.

"By the President of the United States.

"(Signed), ANDREW JOHNSON,

"EDWIN M. STANTON, Secretary of War."

3d. That the northern boundary line of said township twelve, south, range five, east, was surveyed by Frederick Hawn, a deputy surveyor of the United States, in the month of July, 1857, and who established, in conformity to law, landmarks along said line from west to east at the quarter-section corners; and the northeastern and northwestern corners of said fractional section one (1) were established by said surveyor, and monuments erected by him at said corners; that the survey of said Hawn was duly approved by John Calhoun, Surveyor General, August 21st, 1857; that said deputy surveyor Hawn made regular field notes of his said survey, which field notes with a diagram, were filed in the office of the Surveyor General before the approval of the survey, where they have since remained.

4th. That William Weir, jr., a deputy surveyer of the United States, run the eastern line of said township in November, 1856, and established, in conformity to law, landmarks along said line from south to north at the section and quarter-section corners, until he reached the Fort Riley Military Reservation, in which he did not put up any monuments or designate his line by any landmarks, and there was no landmarks or monuments of any kind at the northeast corner of the town-

ship until the same was established and erected by Deputy Surveyor Hawn, in order to close his survey, which monument, placed by Hawn, as aforesaid, became the established northeast corner of the township; that this corner is east of a true line run north by Weir upon which he made no landmarks, and that all the sections on the north line of said township were surveyed and platted to conform to the line and landmarks run and made by Surveyor Hawn; the east lines of sections one to six, inclusive, bearing east of north, instead of being true north and south lines.

5th. That Penebacker and Vandeveer, deputy surveyors of the United States, in the autumn of 1857, surveyed and subdivided all of township twelve (12), south, range five (5), east, aforesaid, except that portion which was situate within the Fort Riley Military Reservation, and established the proper section, quarter-section and closing corners thereon, and that said Penebacker and Vandeveer, in making their said survey, established the line between sections one (1) and twelve (12) to its intersection with the Fort Riley Military Reservation, the length of said line being fifty-three (53) chains and seventy (70) links; and they also established the line between sections one (1) and two (2) to its intersection with the Fort Riley Military Reservation, the length of said line being forty-one (41) chains and eighty-eight (88) links, and put landmarks at the point of intersection of the south and west lines of said section one (1) with the line of said military reservation; that they made proper field notes of their said surveys and filed the same in the office of the Surveyor-General of Kansas Territory, which surveys, so made by them, were approved September 18th, 1858, by Ward B. Burnett, Surveyor-General.

6th. That Robert Armstrong, a deputy surveyor of the United States, in the month of March, 1870, surveyed fractional section one (1), in township twelve (12), range five (5), east, in the Fort Riley Military Reservation, and established all of the corners thereof except such as had been established by Hawn, Penebacker and Vandeveer; that the monuments and landmarks placed by Penebacker and Vandeveer remained and were found as placed by them; also, the monuments

erected by Hawn at the northeast corner of the township remained and was found by said Armstrong as placed by said Hawn; that the landmarks at the northwest corner of said fractional section one (1), erected by Hawn, was missing; its place was supplied by Armstrong with another to mark said corner of section one (1). Said Armstrong surveyed and closed the line from said northwest corner south 16° 10′ W., thirty-nine chains and sixty-seven links in length, to the monument or landmarks erected by Penebacker and Vandeveer on the west line of said section at its intersection with the line of the Fort Riley Military Reservation. He also surveyed and established the line, twenty-six (26) chains and eighty-eight (88) links in length between sections one (1) and twelve (12) from the point of intersection of the line of said military reservation with said sections established by Penebacker and Vandeveer, and the landmarks by them erected east to the southeast corner of the section upon the line run by Deputy Surveyor Weir in 1856, aforesaid, and thence he ran a direct line seventy-nine chains and eighty-two links in length to the monument in the northeast corner of the township, erected by Hawn, as aforesaid; that the said Armstrong, in making his said survey, was governed and controlled by the field notes made by Deputy Surveyors Weir and Hawn and Penebacker and Vandeveer, and instructions from the Surveyor-General requiring him to be so governed, all of which were furnished him to make said survey; that the field notes of the said Armstrong were returned and filed in the office of the Surveyor-General, and were approved by C. W. Babcock, Surveyor-General, April 5th, 1870, and that said survey was made in pursuance of directions from the Commissioner of the General Land Office, and the lines of said fractional section one (1), surveyed and established by said Armstrong, are the same lines mentioned and specified in Defendant's answer, as the exterior lines of fractional section one (1) in the Fort Riley Military Reservation, and that this is the only fractional section one (1) on the west side of said reserve, near Junction City, and that Junction City is, in fact, on a part of this same section one (1) without the former lines of the reserve.

7th. That the said survey by Deputy Surveyor Armstrong was the first and only complete survey of all the lines of said fractional section one (1).

8th. That all of the surveys herein mentioned were duly made in pursuance of laws of the United States, and under the authority and direction of the proper officers of the United States; that the Defendant constructed the railroad across said section in the summer and autumn of 1866, and erected its depot buildings and shops thereon, and has since continued to operate said road.

9th. That on the 2d day of March, 1867, the Congress of the United States adopted and passed the following resolution, which was approved by the President and took effect on that day:

"PUBLIC RESOLUTION—No. 37.

"JOINT RESOLUTION for the Reduction of the Military Reservation of Fort Riley, and to Grant Land for Bridge Purposes to the State of Kansas.

"*Resolved, By the Senate and House of Representatives of the United States of America in Congress assembled,* That the southwestern boundary of the Military Reservation of Fort Riley, in the State of Kansas, be and the same is hereby declared to be hereafter the channel of the Republican River, from its mouth to the point where said river intersects the present western line of said reservation, and the land released from said reservation, and lying between the Smoky Hill and Republican Rivers, is hereby granted to the State of Kansas to aid in the construction of a bridge over the Republican River, on the public highway leading through the present reservation; but upon the express condition that this grant shall be accepted by the State of Kansas with a guarantee given by said State, by an act of the Legislature thereof, that said bridge shall be kept up and maintained in good condition, and shall be free to the use of the government of the United States for all transit purposes forever, without tolls or charges; and on such acceptance and guarantee being filed in the office of the Secretary of the Interior, together with the

certificate of the Governor of Kansas that a good and permanent bridge has been constructed over the said Republican River, it shall be the duty of the said Secretary to issue patent for the land hereby granted to the State of Kansas, or to such company as may be authorized by act of the Legislature of said State to construct said bridge; provided, however, that nothing herein contained shall be construed to interfere with any grant of any part of said land heretofore made by the United States.

"Approved March 2d, 1867."

10th. That on the 26th day of February, 1867, the following act was passed by the Legislature of the State of Kansas, and approved by the Governor of said State on that day, and took effect on the 13th day of March, 1867:

"CHAPTER XXXIV.—BRIDGE ACROSS THE REPUBLICAN RIVER.

"AN ACT Accepting a certain grant of land from the United States to the State of Kansas for bridge purposes, and authorizing the Republican River Bridge Company to construct such bridge.

"*Be it enacted by the Legislature of the State of Kansas:*

"SECTION 1. That the joint resolution passed by the Congress of the United States at the 39th session thereof, and entitled 'A joint resolution for the reduction of the Millitary Reservation of Fort Riley, and to grant land for bridge purposes to the State of Kansas,' be and the same is hereby accepted by the State of Kansas upon the terms and conditions therein named, and the guarantee therein required, 'that a bridge shall be constructed over the Republican River, on the public highway leading through the present Fort Riley Military Reservation, and that said bridge shall be kept up and maintained in good condition, and shall be free to the use of the government of the United States and the citizens of the State of Kansas, for all transit purposes forever, without tolls or charges,' is hereby given.

"SEC. 2. The Republican River Bridge Company, of Davis County, whose certificate of incorporation was, on the 11th day of November, A. D. 1864, filed in the Secretary of

State's office, is hereby authorized and empowered to proceed, under its charter, to construct said bridge.

"SEC. 3. It shall be the duty of said Republican River Bridge Company to complete said bridge within one year from the date of the passage and approval of this act; and immediately after the completion of said bridge it shall be the duty of said bridge company to notify the Governor of this State that such bridge has been completed, whereupon, within ten days after receiving such notice, the Governor shall, in person, together with a competent engineer, proceed to examine said bridge, and, if, upon such examination, the Governor shall find that a good and permanent bridge has been by said Republican River Bridge Company constructed over the said Republican River, it shall be his duty, within ten days thereafter, to certify the same to the Secretary of the Interior, which certificate, together with a certified copy of this act, shall be by the Governor transmitted to the Secretary of the Interior at Washington, D. C., for the purpose of having the same filed in his office; and the Governor shall, at the time of transmitting said certificate and copy of this act, also transmit to the Secretary of the Interior a request that he issue patent for the land mentioned and described in the joint resolution of Congress referred to in the first section of this act, to said Republican River Bridge Company.

"SEC. 4. That before the Governor shall make request to the Secretary of the Interior to issue patent to said land to said Republican River Bridge Company, as provided in the preceding section (3), said Republican River Bridge Company shall deposit with the Governor satisfactory surety and guarantees, fully indemnifying the State of Kansas against any loss or losses by reason of the guarantee herein given by the State of Kansas to the United States.

"SEC. 5. This act shall take effect and be in force from and after its passage and publication once in the Leavenworth Evening Bulletin.

"Approved February 26, 1867.

"S. J. CRAWFORD, Governor.

"I hereby certify that the foregoing is a correct copy of

the original enrolled law on file in my office, and that the same was published in the Leavenworth Bulletin, March 13, 1867.

"R. A. BARKER, Secretary of State."

11th. That, in pursuance of said joint resolution of Congress and of said act of the Legislature of the State of Kansas, on the 13th day of June, 1868, a patent issued conveying to Plaintiff the land in the petition claimed, describing the same as special section 11, town. 12, range 5, together with the other lands mentioned in said resolution, of which patent the following is a copy:

"The United States of America to all to whom these presents shall come, Greeting:

"WHEREAS, in the joint resolution as approved March 2, 1867, of the Congress of the United States, 'for the reduction of the Military Reservation of Fort Riley, and to grant land for bridge purposes to the State of Kansas,' it is stipulated as follows: 'That the southwestern boundary of the Military Reservation of Fort Riley, in the State of Kansas, be, and the same is hereby declared to be, hereafter the channel of the Republican River, from its mouth to the point where said river intersects the present western line of said reservation; and the land released from said reservation and lying between the Smoky Hill and Republican Rivers, is hereby granted to the State of Kansas, to aid in the construction of a bridge over Republican River on the public highway leading through the present reservation; but upon the express condition that this grant shall be accepted by the State of Kansas, with a guarantee given by said State, by an act of the Legislature thereof, that said bridge shall be kept up and maintained in good condition, and shall be free to the use of the government of the United States for all transit purposes forever, without tolls or charges; and on such acceptance and guarantee being filed in the office of the Secretary of the Interior, together with the certificate of the Governor of Kansas that a good and permanent bridge has been constructed over the said Republican River, it shall be the duty of said Secretary to issue patent for the land hereby granted to the State of Kansas, or to such company as may be authorized by act of the Legislature of said State to construct said bridge; provided, however,

that nothing herein contained shall be construed to interfere with any grant of any part of said land heretofore made by the United States:

"AND, WHEREAS, there has been deposited in the General Land Office of the United States an order, bearing date 3d January, 1868, from the Secretary of the Interior for the preparation of a patent to the said Republican River Bridge Company for the lands granted by said resolution, with the proviso to the resolution that it shall not be construed to interfere with any grant previously made, which said order is accompanied by the following described papers: 1st, by a certified transcript of the act, approved 26th February, 1867, passed by the Legislature of the State of Kansas, accepting the Congressional grant aforesaid, with all its conditions; 2d, by the statement, dated 27th December, 1867, under seal from the Governor of Kansas, that he had 'examined the bridge constructed by said Republican River Bridge Company over Republican River, on the public highway leading through the Fort Riley Military Reservation, and found the same to be a good, complete and permanent structure, as required by the provisions of said act of the Legislature,' and, 3d, by the request, bearing date 27th December, 1867, from the said Governor to the Secretary of the Interior that he would 'cause a patent for the land described in said joint resolution of Congress to be issued to said Republican River Bridge Company without delay.'

"And, whereas, there has been deposited in the General Land Office an official plat of survey certified, under date 21st of May, 1868, by the United States Surveyor-General for the State of Kansas, as a correct representation of the survey of that portion of Fort Riley Military Reservation lying between the Republican and Smoky Hill Rivers, upon which said tract is designated as special sections one, three, twelve and thirteen, in township eleven, south of range five, east; special sections ten and eleven, in township twelve, south of range five, east; special sections two, four and five, in township eleven, south of range six, east, and special sections six, seven, eight and nine, in township twelve, south of range six, east, in the State of Kansas, containing, in the aggregate, three thousand

nine hundred and twenty-two acres and six hundredths of an acre.

"Now, know ye, that the United States of America, in consideration of the premises, and in conformity with the joint resolution and order aforesaid, have given and granted, and by these presents do give and grant, subject to the conditions of the aforesaid joint resolution of Congress in favor of the United States, and of non-interference with any other grant which may have been made by the United States prior to said joint resolution unto the said Republican River Bridge Company, and to their successors and assigns forever, the tract of land described according to the aforesaid plat, certified by the said Surveyor General, under date May 21st, 1868, to have and to hold the said tract with the appurtenances, unto the said Republican River Bridge Company, and to their successor and assigns forever. Yet upon the express conditions and stipulations in the aforesaid joint resolution in regard to the free use forever to the Government of the United States of the said Bridge, 'for all transit purposes without tolls or charges,' and that 'nothing herein contained shall be construed to interfere with any grant of any part of said land heretofore made by the United States.'

"In testimony whereof, I, Andrew Johnson, President of the United States of America, have caused these letters to be made patent and the seal of the General Land Office to be hereunto affixed.

"Given under my hand at the city of Washington, this thirteenth day of June, in the year of our Lord one thousand eight hundred and sixty-eight, and of the Independence of the United States the ninty-second.

"By the President:

[SEAL,] ANDREW JOHNSON.

By FRANK COWAN, Secretary.

IN. GRANGER, Recorder of the General Land Office.

Recorded Vol. 12, Pages 431 to 433.

"Which patent is endorsed as follows, to wit:

"Patent—United States to Republican River Bridge Company.

STATE OF KANSAS, } ss.
DAVIS COUNTY, }

"This instrument was filed for record on the 3d day of October, A. D. 1868, at 10 o'clock A. M., and duly recorded in Book C. of conveyances, at pages 71, 72 and 73.

A. C. SCHNELL, [SEAL.]
Register of Deeds."

That the land described in defendant's answer, and to which defendant denies the title of the plaintiff, is worth two hundred dollars an acre; that said defendant was at the commencement of this suit, and still is, in possession of the land described in the answer, to wit, 532 acres.

12th. That on the 12th day of July, A. D. 1867, the defendant caused to be filed for record, in the office of the Register of Deeds of Davis County, in which said land is situate a plat duly executed and acknowledged by defendant, of that portion of the land claimed by plaintiff, which is designated by metes and bounds in the answer of defendant as in possession of defendant and claimed by defendant, by which plat said land was marked as laid out into town lots as an addition to the town of Junction City, except a strip occupied as a right of way by defendant to a width of fifty feet on each side of its track, and except also a piece of land containing about 33 acres, bounded on the north by Thirteenth Street, on the east by Perry Street, on the south by the line of an alley running between Seventh and Eighth Streets, on the southwest by the former line of the Fort Riley Military Reservation, and on the west by Price Street, as marked on said plat.

13th. That defendants, from and after laying out said land as an addition to said town of Junction City, ceased to use the same, (except that portion reserved as a right of way and except said 33 acres,) for any purpose connected with its business in running and operating its railroad; that it offered said land, except its said right of way and except said reserved 33 acres, for sale, and has sold some of the lots so laid out and platted.

14th. That if the joint resolution of July 26th, 1866, is to be construed and held as a grant by Congress to the defendant of said fractional section one (1) there had been no other

grant by Congress of said land prior to the passage of said joint resolution of March 2d, 1867.

And the court further finds as conclusion of Law.

1st. That the joint resolution passed by Congress, (copied above,) approved July 26th, 1866, was and must be construed as a grant by Congress to the defendant of the land in controversy, and that upon the issuance of the executive order of the President, (above copied,) dated July 19th, 1867, the legal title to said land vested in defendant and relates back to the date of the passage of said joint resolution of July 26th, 1866, to which conclusion of law the said plaintiff then and there excepted. JOHN T. MORTON, Judge.

2nd. That said act of the Legislature of the State of Kansas, approved February 26, 1867, taking effect March 13, 1867, was a valid acceptance by the State of Kansas of the grant made by said joint resolution of Congress of date of March 2, 1867; to which conclusion of law the said defendant then and there excepted.

JOHN T. MORTON, Judge.

3rd. That the joint resolution of Congress entitled "Joint resolution for the reduction of the military reservation of Fort Riley, and to grant land for bridge purposes to the State of Kansas," approved March 2, 1867, and the patent issued thereon, conveyed to plaintiff all the land mentioned in said resolution and patent, except the land claimed by defendant, which had been previously granted to defendant by the resolution of Congress of March 26, 1866, entitled "A resolution granting the right of way through the military reserves to the Union Pacific Railroad Company and its branches;" to which conclusion of law both the said plaintiff and the said defendant then and there excepted.

JOHN T. MORTON, Judge.

4th. That the plaintiff is not entitled to recover in this action, and that judgment should be rendered for the defendant; to which conclusion of law the said plaintiff then and there excepted. JOHN T. MORTON, Judge.

As by law of Kansas the syllabus of its decision prepared by the Supreme Court, is only to be regarded as its decision,

and the argument or opinion of the Judge who delivers an opinion is of no effect, we copy only the

SYLLABUS OF SUPREME COURT OF KANSAS,

BY THE COURT, KINGMAN C. J.

"The joint resolution of Congress approved July 26, 1866, authorizing the President, among other things, 'to set apart to the Union Pacific Railroad Company, eastern division, twenty acres of the Fort Riley reservation, for a depot and other purposes, in the bottom opposite Riley City; also fractional section one, on the west side of said reservation, near Junction City, for the same purposes,' with a proviso that the President should not so do, so as in any manner to impair the usefulness of the reserve for military purposes, is a grant of the land dependent upon the favorable judgment and action of the President thereon; and when the President by executive order set apart the land, the title of the railway company thereto became complete."

ASSIGNMENT OF ERRORS.

The Plaintiff asigns for and will especially urge as errors,

1st. That the District Court erred in its *first* conclusion of law on the facts found by such Court.

Such "conclusion of law" will be found on p. 30 of the printed record, and is as follows:

"1st. That the joint resolution passed by Congress (copied above) approved July 26, 1866, was and must be construed as a grant by Congress to the defendant of the land in controversy, and that upon the issuance of the Executive order of the President (above copied) dated July 19, 1867, the legal title to said land vested in defendant, and relates back to the date of the passage of said joint resolution of July 26, 1866."

2d. That said District Court erred in its 3rd "conclusion of law" on the facts found by said Court.

Said "conclusion of law" will be found on p. 31 of printed record, and is as follows:

"3rd. That the joint resolution of Congress entitled "Joint resolution for the reduction of the military reservation of Fort Riley, and to grant land for bridge purposes to the State of Kansas," approved March 2, 1867, and the patent issued thereon, conveyed to plaintiff all the land mentioned in said resolution and patent, except the land claimed by defendant, which had been previously granted to defendant by the resolution of Congress of July 26, 1866, entitled "A resolution granting the right of way through the miiitary reserves to the Union Pacific Railroad Company and its branches."

3rd. That said District Court erred in its fourth "conclusion of law" on the facts found by said Court.

Which conclusion of law will be found on p. 31 of printed record, and is as follows:

"4th. That the plaintiff is not entitled to recovery in this action, and that judgment should be rendered for defendant."

4th. That said District Court erred in overruling the motion of plaintiff for judgment in its favor on the facts found by said Court; which motion will be found on p. 31 of printed record, and is as follows:

"The Republican River Bridge Company, plaintiff, vs. The Kansas Pacific Railway Company, defendant.

In the District Court for Shawnee county, Kansas.

The plaintiff moves the Court herein to render judgment in favor of the plaintiff, on the facts found by the Court.

"5th. The said District Court erred in rendering judgment for defendant on the facts found by the Court."

6th. The Supreme Court of said State erred in affirming the judgment of said District Court.

7th. The said Supreme Court erred in its ruling of the law as given in its syllabus on rendering the judgment affirming the judgment of the District Court, which said ruling will be found on p. 33 of printed record, and is as follows:

SYLLABUS.

BY THE COURT, KINGMAN C. J.

The joint resolution of Congress, approved July 26, 1866, authorizing the President among other things "to set apart to

the Union Pacific Railroad Company—eastern division—twenty acres of the Fort Riley Reservation, for depot and other purposes, on the bottom opposite Riley City; also fractional section 'one' on the west side of said reservation, near Junction City, for the same purposes," with a proviso that the President should not so do so as in any manner to impair the usefulness of the reserve for military purposes, is a grant of the land, dependent upon the favorable judgment and action of the President thereon: and when the President by executive order set apart the land, the title of the railway company thereto became absolute.

ARGUMENT OF B. F. STRINGFELLOW, FOR PLAINTIFF IN ERROR.

On the facts found by the District Court, and which are not disputed, the only questions are those raised on the construction of the joint resolutions passed by Congress; the one of date 2d March, 1867, under which Plaintiff claims, and the other of July 26th, 1866, under which Defendant claims.

PLAINTIFF'S TITLE.

For convenience of reference, we give in full the resolution of Congress and act of the Kansas Legislature, under which Plaintiff claims:

"PUBLIC RESOLUTION NO. 37.

"JOINT RESOLUTION for the Reduction of the Military Reservation of Fort Riley, and to Grant Land for Bridge Purposes to the State of Kansas:

"*Resolved, by the Senate and House of Representatives of the United States of America in Congress Assembled*, That the southwestern boundary of the Military Reservation of Fort Riley, in the State of Kansas, be and the same is hereby declared to be hereafter the channel of the Republican River, from its mouth to the point where said river intersects the present western line of said reservation; and the land released from said reservation, and lying between the Smoky Hill and Republican Rivers, is hereby granted to the State of Kansas to aid in the construction of a bridge over the Republican

River on the public highway leading through the present reservation; but upon the express condition that this grant shall be accepted by the State of Kansas with a guarantee given by said State by an act of the Legislature thereof, that said bridge shall be kept up and maintained in good condition, and shall be free to the use of the government of the United States for all transit purposes forever, without tolls or charges, and on such acceptance and guarantee being filed in the office of the Secretary of the Interior, together with the certificate of the Governor of Kansas that a good and permanent bridge has been constructed over the said Republican River, it shall be the duty of said Secretary to issue patent for the land hereby granted, to the State of Kansas, or to such company as may be authorized by act of the Legislature of said State to construct said bridge; provided, however, that nothing herein contained shall be construed to interfere with any grant of any part of said land heretofore made by the United States.

"Approved March 2d, 1867."

"CHAPTER XXXIV.—BRIDGE ACROSS THE REPUBLICAN RIVER.

"An Act Accepting a certain grant of land from the United States to the State of Kansas for Bridge Purposes, and Authorizing the Republican River Bridge Company to construct such bridge.

"*Be it enacted by the Legislature of the State of Kansas:*

"SECTION 1. That the joint resolution passed by the Congress of the United States at the 39th session thereof, and entitled 'A joint resolution for the reduction of the military reservation of Fort Riley, and to grant land for bridge purposes to the State of Kansas, be, and the same hereby is, accepted by the State of Kansas upon the terms and conditions therein required, 'that a bridge shall be constructed over the Republican River on the public highway leading through the present Fort Riley Military Reservation, and that said bridge shall be kept up and maintained in good condition, and shall be free to the use of the Government of the United States and the citizens of the State of Kansas for all transit purposes forever, without tolls or charges,' is hereby given.

"SEC. 2. The Republican River Bridge Company of Davis county, whose certificate of incorporation was, on the 11th day of November, A. D. 1864, filed in the Secretary of State's office, is hereby authorized and empowered to proceed under its charter to construct said bridge.

"SEC. 3. It shall be the duty of said Republican River Bridge Company to complete said bridge within one year from the date of the passage and approval of this act; and immediately after the completion of the said bridge it shall be the duty of said bridge company to notify the Governor of this State that such bridge has been completed, whereupon, within ten days after receiving such notice, the Governor shall, in person, together with a competent engineer, proceed to examine said bridge; and if, upon such examination, the Governor shall find that a good and permanent bridge has been, by said Republican River Bridge Company, constructed over the said Republican River, it shall be his duty, within ten days thereafter, to certify the same to the Secretary of the Interior, which certificate, together with a certified copy of this act, shall be, by the Governor, transmitted to the Secretary at Washington, D. C., for the purpose of having the same filed in his office. And the Governor shall, at the time of transmitting said certificate and copy of this act, also transmit to the Secretary of the Interior a request that he issue patent for the land mentioned and described in the joint resolution of Congress, referred to in the first section of this act, to said Republican River Bridge Company.

"SEC. 4. That before the Governor shall make request to the Secretary of the Interior to issue patent to said land to said Republican River Bridge Company, as provided in the preceding section (3), said Republican River Bridge Company shall deposit with the Governor satisfactory surety and guarantees, fully indemnifying the State of Kansas against any loss or losses by reason of the guarantee herein given by the State of Kansas to the United States.

"SEC. 5. This act shall take effect and be in force from and after its passage and publication once in the Leavenworth Evening Bulletin.

"Approved February 26, 1867.

"S. J. CRAWFORD, Governor.

"I hereby certify that the foregoing is a correct copy of the original enrolled law on file in my office, and that the same was published in the Leavenworth Bulletin March 13th, 1867.

"R. A. BARKER, Secretary of State."

In accordance with the provisions of the foregoing joint resolution and act of the Kansas Legislature the Plaintiff proceeded to construct the bridge. It was completed in the fall of 1867, and a certificate of the Governor of Kansas was made on the 27th December, 1867, attesting its completion.

The land specified in the joint resolution was afterwards subdivided by a survey made by order of the Land Department, and on the 13th June, 1868, a patent for the same was issued to Plaintiff.

This patent recites the foregoing facts, and includes, with other, the land in controversy, described as special section eleven, in township twelve, south, in range five, east.

It would seem as if there could be no doubt that a perfect title was conveyed to Plaintiff by this patent.

Prima facie, Plaintiff's title is complete, and can only be defeated by an "older and a better" title.

Has Defendant an "older and a better" title?

Conscious of the weakness of its pretended title the Defendant may again attempt to attack the title of Plaintiff, by the pretense that, as the resolution of Congress was approved 2d March, 1867, and the act of the Kansas Legislature accepting the proposition was passed on the 26th February, 1867, (not taking effect, however, until the 13th March, 1867), the resolution and act, and all proceedings thereunder were of no effect.

It is admitted that the act of the Kansas Legislature in terms specifically accepted the joint resolution of Congress, and gave the guarantee and accepted the obligations therein prescribed.

It is admitted that in accordance with the terms of the joint resolution the bridge was completed and the proper guarantee given by the State that it should be maintained free to the use of the Government, and has been daily so used since its completion.

It is admitted that Plaintiff was, in accordance with such joint resolution, "authorized by act of the Legislature to construct such bridge."

It is admitted that on proof of the completion of such bridge by the certificate of the Governor of the State of Kansas, a patent was issued for the land to the Plaintiff.

Yet the Defendant says that all this is to be held for naught: the joint resolution and act of the Legislature of no effect, the patent void, not alone as to the piece in controversy, but as to all the land conveyed by the patent; the Government is to become a repudiator of its contracts, and the citizen to be robbed by his Government of his money and labor!

For what reason shall such wrong be done?

Because, says Defendant, the State granted the land to Plaintiff before she had title thereto!

What is the purpose of such robbery, even under color of law?

Is it to protect the public? No! It is simply to fill to repletion the already gorged beggar! To yield to the cry of "give," "give," not to relieve his proper necessities, not for uses proper to such beggars—legitimate railroad purposes—but to set up the "beggar" as a speculator in town sites!

While admitting the full extent of the rule applicable to grants by a State, it is certainly true, that as to grants and all other contracts by a State, a reasonable share of common honesty and at least a small amount of common sense should be attributed to the State, or its representatives.

In a case like this there should be something more than the "rogue's plea" of "reasonable doubt" to justify the robbery which Defendant volunteers to perpetrate by means of the Government.

There should be no "reasonable doubt" of the proper application of the rule.

The Defendant relies on the case of Rice vs. Railroad Company, 1 Black, 359, as applicable to this case.

He says that the land was granted to the State on 2d March, 1867, and therefore the State had no title on the 27th February, and hence its grant to Plaintiff on 27th February was void.

It is submitted that Defendant utterly misconceives the intent and effect of both the joint resolution and the act of the Legislature, and the decision cited. It will be seen that the resolution does not contemplate that the State shall, nor does the act of the Legislature attempt to make a grant of the land to Plaintiff.

The question considered in the case of Rice vs. Railroad Company, and the only one that is cited as affecting this case, was whether a grant by a State operated as a warranty to pass subsequently acquired property.

No such question can arise in this case as to the act of the Kansas Legislature—that act not pretending to make a grant to Plaintiff.

The joint resolution provides that on the completion of the bridge, the Secretary of the Interior shall issue a patent to the State, or "to such person as may be authorized by act of the Legislature of the State, to build such bridge."

The act of the Legislature does not pretend in any sense to *grant*, so as to raise any question of warranty, but simply authorizes Plaintiff to build the bridge, and when completed and proof made, it then authorizes "the Governor to transmit to the Secretary of the Interior a request" to issue the patent to Plaintiff.

The question, then, decided in the case above cited, of the effect of a grant by the State, when it had no title to the land granted, does not arise in this case, there being no grant of the land by the State.

The effect of this act as between the United States and Plaintiff, will hereafter be considered in connection with another, and, as we regard it, the material question in this case. It will there be seen that even if deemed a grant to the State or by the State to Plaintiff, it is no such grant as that in the case of Rice, in which the State, the grantee, only took part as a naked trustee; but it is a *grant or contract vesting an interest* in the State, and for a benefit to the United States, and so not subject to the ruling of the Rice case.

The Defendant, in this connection, presents another question not presented in the above cited case, and seeks not only to avoid what he terms the grant by the State, but the grant

to the State made by the joint resolution of 2d March, 1867, and to avoid that grant he claims that it was never accepted by the State, because accepted in advance, as he alleges, of the resolution making the grant.

As to this, and as to the other propositions already considered, we now add that we deny that the act of the Kansas Legislature is to be deemed as prior in effect to the joint resolution, though in fact it be true that the act was passed or approved before the approval of the resolution.

The Defendant is curious to know how the act should so specifically define and accept the provisions of the joint resolution in advance of its approval.

The explanation is simple. The resolution was passed by Congress, then the act was passed, and the Governor of Kansas, as being more active or less burdened with labor, was enabled to sign and approve the act before the President had signed the resolution. While, however, the signature of the President put in force and made the resolution a law on the 2d March, 1867, the act of the Legislature remained inoperative, though approved, until the 13th March, 1867, when it became a law, eleven days after the joint resolution was in force.

Technically, then, the technical objection made by Defendant does not avail. This was the ruling of the District Court expressly, and this was impliedly affirmed by the State Supreme Court.

But a principle higher far than these mere quibbling attempts to evade the rules of fair dealing, is a principle of common honesty which applies not only between man and man but between the government and its citizens.

It is that when the government makes a proposition, and it is accepted and complied with, and the government receives the benefit of labor or money expended in its performance, it is too late to object to the mere form of the acceptance.

In this case the government proposed, in consideration that the State should build a bridge, and guarantee its maintenance and its free use by the government, that it would convey to the State or to such company as should do the work, certain lands as a compensation.

After the bridge is built, accepted and used by the Government, it is too late for it to say to the workman, we will not pay you, because the State accepted our proposition in advance.

Much less after the Government has in good faith conveyed the land in accordance with its contract, will a stranger be permitted to volunteer such a fraudulent defence in behalf of the Government.

It has been intimated that the land in controversy was not surveyed and numbered as required by law. It is only necessary to say that this was not public land, but was surveyed as a private grant, and as such was not required to be surveyed according to the law regulating public surveys.

We now pass to the

DEFENDANT'S TITLE.

It will be seen that Defendant has no patent, his title papers coming through the war and not the Land Department.

It will be seen, too, that Defendant's title has a different foundation in the opinion of each of the courts which have passed on it, and will find still another foundation in the brief of Defendant. They all concur, however, in basing Defendant's title mainly on the proviso in the above recited joint resolution, 2d March, 1867, and the patent issued thereon, conveying this with other land to Plaintiff.

That proviso is as follows:

"Provided, however, that nothing herein contained shall be construed to interfere with any grant of any part of said land heretofore made by the United States."

This may be termed,

DEFENDANT'S TITLE BY EXCEPTION.

How is this exceptional title derived?

The Judge who delivered the opinion of the Supreme Court says: "Congress must have understood" the resolution under which Defendant claims "as a grant"; for at the next session it excepted from the land granted to the State and now claimed by the Plaintiff, "any grant of any part of said land heretofore made by the United States." "There was no grant of this land unless the resolution made one to the Defendant. This conclusion disposes of the case."

On this as on other questions, however, the District Court is much more lucid in the expression of its opinion. That Court says in its 14th and last finding of fact:

"14th. That if the joint resolution of 26 July, 1866, is to be construed and held as a grant by Congress of fractional section

one (1), there had been no other grant by Congress of said land prior to the passage of the joint resolution of 2d March, 1867."

And thereupon the Court declares its conclusions of law as follows: "That the joint resolution passed by Congress approved July 26, 1866, was and must be construed as a grant by Congress of the land in controversy," etc., p. 30 of printed record.

We thus find both Courts assuming the proviso in the grant of 2d March, 1866, recited in the patent to be an admission that "some part of the land" granted and conveyed had been already granted; and as "no other grant of any part of such land" could be found, by these courts, they "conclude" that the resolution of July, 1866, "must be held to be a grant of fractional section one," the land in dispute.

The joint resolution of July, 1866, is not *per se* a grant, but it is thus made a grant by the assumed admission of Congress in this proviso.

It will seem strange that while thus compelled by the pretended admission in the proviso, that there had been a "grant of some part of said land" to search for such grant; and in such search groping blindly, and unable to find any other, these courts should feel forced to conclude, that the provision in the resolution of July, 1866, relating to fractional section one, must be the grant referred to, since, as will be seen by reference to the resolution, that piece of land is not only not referred to as a grant, but in the very title of that resolution, and in the first clause thereof, is found a grant, in terms, of another part of the land!

The title of the resolution of July, 1866, is "A resolution *granting the right of way*, through military reserves, to the Union Pacific Railway Company and its branches," and as will be seen by reference to the resolution, the first clause, *in terms, grants the right of way* through all military reserves to the U. P. Railway and branches.

The Defendant is one of those branches, and here gets in terms a grant to a part of the land mentioned in the resolution of March, 1867, and in the patent to Plaintiff, *a grant of the right of way through those very lands.*

As we here find an express grant of a part of the land referred to in the proviso, there is no need to force another grant of a different piece of the land, to meet the assumed admission of the proviso, that some grant had been made.

Thus this, the corner-stone of Defendant's title, is destroyed.

But the law based by these Courts on the proviso, is as unsound as is their assumption of the admission of the proviso.

What is the legal effect of the exception contained in the proviso to the resolution of March 2d, 1867, and the patent to Plaintiff issued thereunder?

This Court has so repeatedly and explicitly determined the effect of such exceptions that there is no excuse for argument on the proposition.

One of these decisions will be found in 24 How., on p. 177 to 182. In that case the proviso was not as here, the general exception common to all grants, but was a specific exception of certain specified lands, the title to which had been confirmed by a former act. The Circuit Court had there held, as the State Courts have here held, that "by such exception a tract embraced in the prior act, was excluded and did not pass by the patent." This Court held that the Circuit Court erred in such ruling, and on page 178 defines the purpose and effect of such exceptions.

This Court declares that,

1st, Such exception is only to exonerate the United States from the claim of the grantee in the event of his ouster by persons holding under the acts referred to in the proviso.

2d, It can not be construed as separating any lots or parcels of land from the operation of the grant or patent.

3d, Or as affording another confirmation of titles existing under acts of Congress described in it.

These principles thus decide,

1st, That such exceptions *can only be set up as a defense by the government, against the claim of the grantee, for a failure of title, and do not avail any stranger.*

2d, That they do not impair the title of the grantee to the land embraced in the grant, *nor exclude any part thereof from the operation of the grant.*

3d, They do not aid the title of any other, if he have a title, nor much less make a foundation for any other title.

As between all others, except the government grantor, and the grantee, it is as though no such exception were inserted in the grant.

The grantee, and all others but the government, must stand on their respective titles as if no such exception were made.

HOW STANDS THE TITLE APART FROM THE EXCEPTION?

What title could Defendant acquire under the resolution of July 26th, 1866, if unaffected by the resolution of March 2d, 1867?

It will be observed that the resolution of July, 1866, under which Defendant claims, presents several distinct questions relating to the land in controversy.

1st. What land was the President authorized to "set apart" to Defendant?

2d. Was the authority to "set apart" such land to Defendant *a railroad company, as expressed, "for depot and other purposes"* intended to *limit the purposes to those proper aud usual to railroad companies*, or was it intended to give an absolute title to the land, to be disposed of by the railroad as it pleased?

3d. Was any *interest in the land vested* in the railroad company, Defendant, by the resolution of 26th July, 1866, before the President acted under the resolution, and made the order setting apart the land to Defendant?

4th. Did the order of the President, when made, have the effect to relate back to the date of the resolution and cut out all intervening titles?

For convenience, we give the resolution, in full, separating its several clauses relating to distinct subjects, the more readily to apprehend the intent of Congress in the clause specially under consideration?

"A RESOLUTION Granting the Right of Way through Military Reserves to the Union Pacific Railroad Company and its Branches.

"*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled:*

"That, subject to approval by the President, *the right of way, one hundred feet in width, is hereby granted* to the Union Pacific Railroad Company and the companies constructing the branch roads connecting therewith, for the construction and operation of their roads over and upon all military reserves through which the same may pass.

"*And the President is hereby authorized to set apart to the Union Pacific Railroad Company, Eastern Division, twenty acres of the Fort Riley Military Reservation for depot and other purposes, in the bottom opposite Riley City; also, fractional section 'one' on the west side of said reservation, near Function City, for the same purposes.*

"And also, to restore, from time to time, to the public domain any portion of said military reserve over which the Union Pacific Railroad or any of its branches may pass, and which shall not be required for military purposes; *provided*, that the President

shall not permit the location of any such railroad, or the diminution of any such reserve, in any manner, so as to impair its usefulness for military purposes so long as it shall be required therefor.

"Approved, July 26th, 1866.

We have italicized portions of this resolution the more distinctly to point out its intent.

1st. What land was the President authorized to "set apart" to Defendant?

He had no discretion as to the piece of land, but could only set apart *a fractional section* numbered one, and located "on the west side of the reservation near Junction City."

This is but a minor question, yet, in view of the intent of the resolution, is material.

We submit, then, that inasmuch as the resolution requires the President to exercise his judgment as to the propriety of setting apart this land with special reference to its usefulness for military purposes, and in consideration that a fractional section has no legal boundaries or area, but can only be fixed by a survey of other tracts to an irregular boundary, it was necessary that this fractional section should have been surveyed, its boundaries and area defined, before the President was authorized to set it apart.

As will be seen by reference to the 7th finding of the District Court, no complete survey was ever made of this fractional section, except by Armstrong: and as will be seen in the 6th finding of fact, that survey was made and the fractional section established in 1870, long after this suit was brought. We submit then that the order of the President of 19th July, 1867, was inoperative. As no such order has been made since the survey, the land has not yet been set apart to Defendant.

2d. Was the authority to set apart such land to Defendant, a railroad company, as expressed for "railroad and other purposes," intended to limit the purposes, to those proper and usual to railroad purposes; or was it intended to give an absolute title to the land, to be disposed of by the railroad company as it pleased?

This presents the question:

What title could Defendant get under the resolution of July 1866, without reference to the resolution of March 1867.

Without criticising the use of the term "grant" as applied by the Defendant and the State courts to the provision of this resolution relating to the land in dispute, but remarking merely that "grant" is not used as a technical term, but is employed as an indefinite general expression; and so treating this as a

"grant," we shall have to ascertain the extent of the grant, the interest or estate granted.

Does the resolution of July, 1866, grant a fee, or merely an easement in the land for railroad purposes.

This Court has clearly defined the rules for the construction of grants by the Government.

They are:

1st. The intent of the Government in making the grant must control.

2d. This intent must be gathered from the grants.

3rd. The language of the grant must be construed most strongly against the grantee, and in favor of the Government.

4th. The intent must be clear in favor of the grantee: he can take nothing by construction intimation, insinuation or inference.

5th. If two constructions can be given, that must be accepted which grants the least. 23 How. 66; 1 Black 359.

These rules conclusively exclude the claim that a fee was intended, and are equally conclusive that only the less estate, an easement for the usual purposes of the railroad company, was intended to be given to Defendant by this provision of the resolution.

This is apparent on the face of the resolution.

The title of the resolution refers to the grants intended to be made, but is silent as to the pretended grant.

The term "grant" as used in both the preamble and the body of the resolution, relates only to an easement; to the right of way granted to the U. P. R. R. and its branches: and yet even in this restricted sense the term is not applied to nor employed in connection with this land; but still more restricted language is employed: there is a mere authority given to the President "to set apart this land to Defendant" for certain specified uses.

The terms "set apart," as defined by Webster, imply an intent to appropriate the property, *not to a general*, but to *a particular use*.

But the intent of Congress is still more conclusively shown by an examination of the different provisions of the resolution.

As seen, the first clause "grants" the right of way through military reserves, and in its effect "grants" the right of way to Defendant through the land granted afterwards by the resolution of March, 1867, to the State.

If Congress had intended to "grant" section one to Defendant, it would, after thus granting the right of way, have proceeded, "and there is also granted to the U. P. R. R., Eastern Division, fractional section one."

It will not serve to say, as the State Courts say, that the "grant was dependent on the favorable judgment and action of the President," as an excuse for not making this a "grant in terms."

The grant of the right of way is equally "subject to approval by the President."

The use of the fit term "grant" in the one case, and its omission in the other, is convincing evidence that Congress did not intend to make a "grant" in the latter.

Not only have we this evidence in the language used touching these several appropriations of the land, but the succeeding clause is conclusive that Congress did not intend, by the clause authorizing the President to "set apart" this land, to grant the land to Defendant.

By the clause in the resolution immediately following the one authorizing the President to "set apart" the land in controversy, the President is authorized at his discretion to diminish reserves and restore any portion of the reserve to the condition of other public lands.

By exercising this power the President could have excluded this land from the reserve, and then, as an odd section, under the law granting lands to the Pacific road, it would have vested in fee in Defendant.

If Congress had, then, the intention to grant this land to Defendant, it would undoubtedly have made its intention clear, either by granting it in terms, as in the clause preceding, or by reducing the reserve as contemplated in the clause succeeding the one authorizing a disposition of this land.

It neither makes a grant in terms, nor diminishes the reserve so as to make a grant in effect.

It is equally clear, however loose the terms used in the order of the President may be, that he, too, never intended to make a a grant in fee to Defendant by his order.

Had such been his purpose, he would, instead, have reduced the reservation, and excluded this land and thus vested a fee in Defendant.

The very clause itself is a case of an attempt "by insinuation" to acquire a title not intended, and which it was not safe to seek openly.

The provision is "insinuated," as it were, sandwiched, between the other provisions of the resolution, and is a most fit case for the criticisms of the Court, so forcibly expressed in the cases above cited. 23 How., 66; 1 Black, 359.

It will be seen that neither Congress nor the President contemplated that the land thus set apart should be taken out of the reservation; and this is conclusive against the claim that the land was intended to be "set apart" as a fee, and for a town site.

This renders imperative the application of the rule above cited as laid down by this Court:

"That, if two constructions can be given, that must be adopted which grants the least."

And as the construction which grants the least, the easement, or use for proper railroad purposes, is so much more in accordance with the manifest intent of the resolution than would be the fee used as a town site while still in the reserve, we can see no room for doubt that such will be the construction.

The Defendant argues that Congress could not have contemplated the use of so large a tract for railroad purposes.

It will be observed that the extent of this tract was not known to Congress nor to the President until long after his order was issued. It was simply represented as a fractional section near Junction City.

Congress and the President might each *reasonably infer that this fraction* would contain no more than was required for side tracks, depots, shops, cattle yards and other purposes proper to a railroad adjacent to a town.

Neither Congress nor the President can be held as seeking to enable this railroad company to become a rival to the speculators interested in the site of Junction City, or to aid the railroad company to build up a rival to and thus destroy a town already in existence.

We find, then, additional reason for the criticisms of this Court already cited, and for the application of the most rigid of the rules adopted in such cases.

Applying, then, the rule which gives the least, and hence giving only an easement for railroad purposes, we find that easement abandoned, and thus the title of Plaintiff relieved of this incumbrance.

The 12th and 13th findings of the District Court show that since the 12th of July, 1867, one week, in fact, before the order setting it apart was issued by the President, the Defendant filed a

plat of this land, laying out into lots, blocks, streets and alleys all save its right of way and some thirty-three acres occupied for proper railroad purposes, and has since abandoned all use of all save its right of way and the thirty-three acres for any railroad purposes.

3d. Was any interest in the land vested in the Defendant by the resolution of 26th of July, 1866, before the President acted under the resolution and made the order setting apart the land to Defendant.

This question involves not alone the question of right as against the Plaintiff, but even more—a question of power in Congress.

By the Constitution, Congress has the unrestricted control of the disposal of the public lands, and until some *private person acquires a vested interest in the lands against the government, such control is absolute.*

Such interest once vested in the land, it is no longer public land—no longer subject to the control of Congress—but is beyond its power—protected by the Constitution as private property.

Did Defendant acquire any such interest in this land by the resolution, before the order was issued by the President? Had Congress the right to repeal this resolution at any time before action was taken thereunder by the President? Had Congress the power to rescind the authority given by the resolution to the President to reduce the military reservation or to give his permission and approval to the location of these railroads through them, or to "set apart" this land. It would seem only necessary to suggest these questions; but one answer being possible, not only on the well settled principles relating to the public lands, but on the plain reading of the resolution.

It would seem as if the State courts in this case had misconceived the real question involved, and had deemed it as only important to ascertain when the formal title became complete. This is not important, but it will be seen the *real question is, when did an interest in the land vest in Defendant.*

There is evident confusion in their minds on this question, and it is not easy to ascertain whether they intend to fix a time at which an interest in the land vested in Defendant.

Under the Kansas law, we are restricted to the syllabus of the Supreme Court in the exposition of the legal principles decided by the Court. We are thus left in this case to the "conclusion of law," by the District Court, and the syllabus of the Supreme Court for the principles which were decided in this case.

In neither, as will be seen, is there any attempt to determine this most important question, of the time at which an interest in the land vested in the Defendant.

The District Court in its 1st conclusion of law, holds p. 20 of record:

"1st. That the joint resolution * * of July 1866, was a grant of the land in controversy to Defendant, and upon the issuance of the order by the President of July 19, 1867, the *legal title* to said land *vested* in defendant."

The Supreme Court in its syllabus says, p. 33 of record:

"The joint resolution of July 26, 1866 * * * is a grant of the land, * * and when the President by Executive order set apart the land, the *title* of the railway company became absolute."

The District Court says, "on the order of the President" the *legal title* to the land *vested* in Defendant; the Supreme Court says that then "the title of Defendant became absolute."

Neither tells us where the title was before the order was made. Each Court, however, seems to hold that the resolution was a *grant*, and therefore immediately *vested* an *interest* in defendant which became a *legal title* on the order of the President.

What, then, was the *interest* granted by the resolution?

If, as we have seen, it was *an interest in the land*, then the grant could not be repealed, but this interest would be protected against even Congress and the government; the resolution by which this interest was "granted," or under which it *vested*, could not be repealed; nor could Congress, with all its power, dispose of this land so as to deprive Defendant of this, his *vested interest*.

The Supreme Court of the State seems to treat, and it has been argued by Defendant, as if it were a *conditional grant*, dependent on the action of the President.

We will not dispute about words, nor stop to inquire what is meant by such a grant.

If it be a grant which vests no interest in the thing granted, which, in other words, grants nothing until the happening of the so called contingency, it does not effect the question to call it a grant.

We have an illustration of such a "*grant*" in the Pacific and other railroad grants, and, indeed, in another clause of this very resolution.

In these railroad grants, not only is land along the line of the road granted in terms, but the right of way through other public

lands is granted, as in this resolution the right of way through the military reserves is granted. In all these cases the grants are conditional, in some taking effect on the location of the line of the road, in others on the approval of the President.

And yet in no one of these cases has it ever been imagined that any interest in the land or right of way granted vested in the grantee on the mere passage of the act, or until the happening of the contingency.

Thus is it of daily experience that the government disposes of land through which the line of the road is subsequently located, or within the limits of the land granted along the line of the road, as subsequently located.

The Defendant has had at least two controversies involving the title to large bodies of land, and growing out of such grants, where the question was, when the interest in the land vested; and no one imagined that this was determined by the date of any act granting such lands.

So, too, of acts granting pre-emption and homesteads. These are all termed "grants," and yet it was never imagined that these acts vested any interest in the land on their mere passage; nor where a title under such acts became complete, that it related back to the passage of the act.

In each case the question of title depends on the date, not of the law making the grant, but on *the date at which an interest in the land vested in the claimant, as against the government.*

In each case of such grants, the time at which an interest in the thing granted vests, must depend upon the terms of the grant, and no general rule can be defined for all cases.

In this case it would be an insult to the intelligence of the Court to even consider the question whether any interest in the land was vested in Defendant before the order of the President was issued.

When that order was made, if ever, an interest in the land vested in the Defendant. Until such order was made the Defendant had no interest in the land.

The President had the right to refuse, and could not be compelled to make, such order. Congress could, as it did, bargain to convey such land to the State as compensation for work done for the benefit of the United States, or could make a donation of the land to any other, or could refuse the authority given to the President and retain the land for military purposes.

Questions like this have been frequently before this Court,

and the principles involved fully considered. This Court has not only decided when an interest vests under such grants; has held that such question is never, in these "conditional grants," as they are loosely called, affected by the date of the act, but it has uniformly held that until an interest in the property is vested in the claimant as against the Government, he has no interest known to the law, but the power of Congress to dispose of the property remains complete.

It has so held against the grantees under pre-emption laws, a class with far higher claims on its sympathy than the bloated beggar who here seeks to monopolize even the town sites along its line. 9 Wallace 192 to 197, inclusive, and cases cited and approved; 15 Wallace 77, approving same.

These cases conclusively show that no interest in the land in controversy could vest in Defendant until the order of July, 1867, was made by the President.

This is an answer to the next question presented in this case.

4th. Did the order of the President when made relate back to the date of the resolution, and cut out intermediate titles?

In addition to what has already been said on this question, we will add:

The order could not relate back, else it would defeat the power of Congress over the land even before any interest therein had vested in Defendant.

And we say further, that, *in no case does a title relate back beyond the inception of the interest thus perfected into a title; or, as stated in the cases already cited, beyond the date at which an interest in the land vested in some person against the Government.*

See cases cited above, and 12 How. 76–77, and following: 1 Peters 162, 13 Peters 451, 10 How. 348, Landis vs. Brant, a leading case as to relation of title; 12 How. 59, Lessieur vs. Price, as to when interest vests, and also as to relation of title.

We have now shown that even if the resolution of 26th July, 1866, under which Defendant claims be deemed a grant, yet that no interest could vest thereunder, until an order should be made by the President setting apart the land to Defendant.

That until such order was made the resolution could be repealed by Congress, and the power of the President rescinded—either expressly or impliedly by a different disposition of the land by Congress.

We have shown that Congress did dispose of the land by a resolution passed four months before the order was made by the President.

We have shown that the order, when made by the President, had not the effect to relate back, and so make the title of Defendant cut out the title created by the resolution of Congress of 2d March, 1867, under which Plaintiff claims.

We add but a word as to the effect of the resolution of Congress of 2d March, 1867, granting the land to the State of Kansas.

This resolution was in terms a grant of the land *in presenti* to the State, and so repealed the resolution of 26th July, 1866, so far as it authorized the President to make a different disposition of the land. The order of the President made thereafter was a nullity, and could give no title to Defendant. It therefore matters not whether the title acquired by Plaintiff relates back to the date of the resolution under which it was acquired, or to any period anterior to the order of the President, that order being without authority.

We, however, insist that the resolution of 2d March, 1867, was a grant *in presenti*, and vested an interest in the land granted *eo instanti* in the State; or, at all events, such interest vested on the acceptance of the resolution by an act which took effect on the 13th March, 1867, *four months* before the order of the President, which was made on the 19th July, 1867.

In either event the title of Plaintiff by the patent relates back to one of these dates, and is thus prior in law to the pretended title of Defendant.

It matters not, then, at what time a formal title was completed to these parties, an interest in the land having vested in Plaintiff under the resolution of 2d March, 1867, before any such interest had vested in Defendant by the President's order of 19th July, 1867. The Plaintiff has the older title and is entitled to recover.

The Plaintiff is, in fact, entitled to recover not only the entire tract, including the 33 acres used for railroad purposes, but even the right of way through the land granted by the resolution of 2d March, 1867.

The Defendant, by the terms of the resolution of July, 1866, acquired no interest in or title to its right of way through military reserves, until the approval of the President to the location of the road and the appropriation of the right of way is given.

In this case, as found by the District Court, no such approval was given by the President until he made the order of 19th July, 1867, four months after Plaintiff's right had vested.

CONCLUSION.

To sum up the argument, we claim,

1st. That under the resolution of 26th July, 1866, which authorized the President at his election to set apart the land in dispute, designated as "fractional section one," of the Fort Riley Military Reservation, to Defendant, "for depot and other purposes," the President could not set apart any land until surveyed and defined as a "fractional section."

2d. That until the President acted under this resolution, and "set apart the land to the Defendant, no interest in such land could vest in Defendant.

3rd. That until such interest had vested in Defendant, Congress had the power to repeal the authority of the President or to dispose of the land at its will.

4th. That Congress did rescind the authority of the President, and did make a different disposition of the land by the resolution of 2d March, 1867, granting this land to the State of Kansas.

5th. That thereupon the authority of the President to set apart the land to Defendant ceased, and his order of July 19, 1867, four months after his authority had been rescinded, was a nullity, and could not relate back to the date of the resolution of July 1866, so as to cut out the title of Plaintiff.

6th. That Congress had the right to grant the land in dispute to the State of Kansas by its resolution of 2d March, 1867, and thus prevent its appropriation to Defendant by the President under the unexecuted authority given him by the resolution of 26th July, 1866.

7th. The resolution of 2d March, 1867, its acceptance by the Legislature of the State of Kansas, and the patent thereunder to Plaintiff, vest a complete title in Plaintiff to the land in dispute; and it relates back to the date of the grant, 2d March, 1867, or to its acceptance, 13th March, 1867, both prior to the order of the President.

8th. The approval of the President to the appropriation of the right of way by Defendant through the land in dispute, not having been given until after an interest in the land had vested in the State under the grant of 2d March, 1867, and Plaintiff having acquired the right of the State by the patent, is entitled to recover as against such right of way.

9th. The only interest, if any, which Defendant a railroad company could have acquired under the resolution of 26th July, 1866, was an easement in the land in despute for railroad purposes. The abandonment of such use by the laying the land into town lots forfeits such title, and relieves the title of Plaintiff to such land of such easement.

In any view then, Plaintiff is entitled to recover for all the land except the right of way, and the 33 acres used for proper railroad purposes.

B. F. STRINGFELLOW, *For Plaintiff.*

Supreme Court of the United States.

OCTOBER TERM, 1875.

THE REPUBLICAN RIVER BRIDGE COMPANY

vs.

THE KANSAS PACIFIC R. R. Co.

No. 154.

In Error to the Supreme Court of Kansas.

BRIEF OF DEFENDANT IN ERROR.

The Plaintiff in Error brought an action in the District Court for the County of Davis, in the State of Kansas, to recover of the defendant the possession of a certain tract of land, and damages for the alleged wrongful detention thereof. The Court tried the issues raised by the pleadings, and after a separate finding of the facts and of the conclusions of law thereon arising, rendered a judgment in favor of the defendant, which was affirmed

by the Supreme Court. On error to that Court, the Record was removed here.

The plaintiff's petition will be found in the Record, p. 6; the amended answer of defendant, p. 12; the finding of the facts and of the conclusions of law, pp. 13–21; and the opinion of the Supreme Court, pp. 33–36.

In the pleadings of the respective parties there is an apparent discrepancy in the description of the lands. There is, however, no question as to their identity. It is an undisputed fact that they cover 532 acres, being a part of so much of the former military reservation at Fort Riley as is situate between the Smoky Hill river and the Republican, containing $3{,}922\frac{6}{100}$ acres; and that, under claim of title, defendant was in possession of them at the commencement of the suit.

Although the action of ejectment has, with all its fictions, been abolished in every State which has recently adopted a code of civil procedure, the plaintiff, who sues for the possession of real property, must still recover on the strength of his own title. This ancient and well-established rule exists in full force and is the acknowledged law in Kansas. *State* v. *Stringfellow*, 2 Kans., 263; *Bancroft* v. *Chambers*, 10 *Id.*, 364.

The plaintiff claims title under a joint resolution of Congress, No. 56, approved March 2, 1867, (Stat. vol. 14, p. 573,) an act of the Legislature of Kansas approved February 26, 1867, and a patent from the United States of June 13, 1868, issued in professed compliance with the joint resolution. Record, p. 18. The act is set out *Id.*, p. 17, and was published March 13, 1867, in the Leavenworth *Evening Bulletin*.

The joint resolution is as follows:

JOINT RESOLUTION for the reduction of the military reservation of Fort Riley, and to grant land for bridge purposes to the State of Kansas.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the southwestern boundary of the military reservation of Fort Riley, in the State of Kansas, be, and the same is hereby, declared to be hereafter the channel of the Republican river from its mouth to the point where said river intersects the present western line of said reservation; and the land released from said reservation, and lying between the Smoky Hill and Republican rivers, is hereby granted to the State of Kansas to aid in the construction of a bridge over the Republican river on the public highway leading through the present reservation, but upon the express condition that this grant shall be accepted by the State of Kansas with a guarantee given by said State, by an act of the Legislature thereof, that said bridge shall be kept up and maintained in good condition, and shall be free to the use of the Government of the United States for all transit purposes forever, without tolls or charges; and on such acceptance and guarantee being filed in the office of the Secretary of the Interior, together with the certificate of the Governor of Kansas that a good and permanent bridge has been constructed over the said Republican river, it shall be the duty of said Secretary to issue patent for the land hereby granted to the State of Kansas, or to such company as may be authorized by act of the Legislature of said State to construct said bridge: *Provided, however*, That nothing herein contained shall be construed to interfere with any grant of any part of said land heretofore made by the United States.

Approved March 2, 1867.

The first section of the act of the Legislature is in these words:

Be it enacted by the Legislature of the State of Kansas:

SECTION 1. That the joint resolution passed by the Congress of the United States, at the thirty-ninth session

thereof, and entitled "A joint resolution for the reduction of the military reservation of Fort Riley, and to grant land for bridge purposes to the State of Kansas," be, and the same hereby is, accepted by the State of Kansas upon the terms and conditions therein named; and the guarantee therein required "that a bridge shall be constructed over the Republican river on the public highway leading through the present Fort Riley military reservation, and that said bridge shall be kept up and maintained in good condition, and shall be free to the use of the Government of the United States and the citizens of the State of Kansas for all transit purposes forever, without tolls or charges," is hereby given.

If it be admitted that the joint resolution, although in terms providing for the issue of a patent, would *proprio vigore* vest in the State of Kansas, upon her performance of the specified conditions, a title to the land therein mentioned, except so much thereof as was covered by a prior grant, it seems to be clear that the ownership of the plaintiff could, in no aspect of the case, attach before the 13th of June, 1868, the date of the patent. Such an instrument is *prima facie* evidence that all the incipient steps required for the consummation of the title have been regularly taken, (*Bagnelle* v. *Broderick*, 13 Peters, 430; *Minter et al.* v. *Crommelin*, 18 Howard, 87;) but where it cannot be lawfully issued except upon the performance of certain conditions by the patentee, and the non-performance of them is affirmatively shown by its recitals, it furnishes on its face conclusive proof that the officer who issued it has exceeded his authority, and it is void in law. *Polkes Lessee* v. *Wendell*, 9 Cranch, 99; 5 Wheaton, 303; *Patterson* v. *Winn*, 11 Wheaton, 388.

In the present case the patent states, among other matters, the act of the Legislature and the joint resolution of Congress. The former was first passed, and is

therefore not in compliance with the terms of the latter. An acceptance by words *in presenti* of a supposed grant which was not then in existence is an absolute nullity. The words "*shall be accepted*" manifestly import that some act is to be thereafter done by the State. Of such act, with the required guarantee on her part, a legislative enactment, subsequent in date to the joint resolution, is the prescribed and indispensable proof. No such enactment was ever passed.

It is true that the act of February 26, 1867, did not take effect until, as was therein provided, it should be inserted in the Leavenworth *Evening Bulletin*. The 10th section of the 2d article of the Constitution of Kansas directs that "the Legislature shall prescribe the time when its acts shall be in force, and shall provide for the speedy publication of the same; and no law shall be in force until the same shall be published." It intended to secure for them publicity before they were put in execution, and it changes the modern rule in regard to acts of Parliament, as they, unless some other time is named, take effect from the royal assent. The canons which govern in interpreting them are equally applicable to the statutes of Kansas, except in some special cases foreign to the point under discussion, where a different rule has been adopted. It must, for example, be conceded that, without words of express repeal, an act would be repealed by another in conflict with it passed at a subsequent day of the same session, although the first act was published last. Whilst no right can be asserted, or punishment inflicted, or forfeiture incurred under a statute of that State by reason of things done or omitted before it was published, it is, neverthless, a law as soon as it is approved by the Governor. The execution of it is suspended until it shall be published. So the taking effect

of an act of Parliament or of Congress may be deferred to a specified time, or to the happening of a certain contingency. The obvious and conclusive answer to any claim grounded upon the pretended acceptance declared by the act of February 26 is, there was nothing to accept. If this was true at that date, the state of things was not changed by printing the act in the *Bulletin* after the passage of the joint resolution. The Secretary of State could not give validity or binding force to what was void *ab initio*. The rights of the defendant, claiming under an elder grant, remain the same, whether publication of the act was made on the day of its approval by the Governor, or was postponed to a later period.

This is a fatal objection to the plaintiff's recovery; but, without further insisting upon it, we submit that the defendant was vested with a prior and paramount title under the resolution of July 26, 1866, (14 Stat., 367,) and an order of the President bearing date July 19, 1867. Record, p. 23.

The resolution is as follows:

No. 85. A RESOLUTION granting the right of way through military reserves to the Union Pacific Railroad Company and its branches

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That, subject to approval by the President, the right of way one hundred feet in width is hereby granted to the Union Pacific Railroad Company, and the companies constructing the branch roads connecting therewith, for the construction and operation of their roads over and upon all military reserves through which the same may pass; and the President is hereby authorized to set apart to the Union Pacific Railroad Company, eastern division, twenty acres of the Fort Riley military reservation, for depot and other purposes, in the bottom opposite Riley City; also fractional section "one," on the west side of said reservation, near Junction City, for the same purposes;

and also to restore, from time to time, to the public domain any portion of said military reserve over which the Union Pacific Railroad or any of its branches may pass, and which shall not be required for military purposes: *Provided*, That the President shall not permit the location of any such railroad or the diminution of any such reserve in any manner so as to impair its usefulness for military purposes, so long as it shall be required therefor.

Approved July 26, 1866.

The Court finds that "fractional section one, in said resolution mentioned, is the land described in defendant's answer, for which she defends, and denies the title of the plaintiff," and is part of the lands described in plaintiff's petition, and that the defendant at that time was called and known by the name of the Union Pacific Railroad Company, eastern division.

The resolution provides, in substance and effect, that the title to the premises in controversy, as well as to the twenty acres, should vest in the defendant, unless in the opinion of the President the value of the reservation for military uses would be thereby impaired. On determining that question, as he did in this case, the defendant had a perfect right to an order or patent, and it was his duty to cause it to be issued. The words "and directed" might have been added to "authorized;" but the resolution so modified, whilst less in keeping with the forms of respect due to his high position, would not more clearly exclude the exercise of his discretion in the matter. So far as the twenty acres are concerned, although a present and immediate interest passed to that quantity of land, yet inasmuch as it was not set forth by metes and bounds, or otherwise specifically described, some measures were requisite to locate the grant before the title attached to any particular parcel. An order founded on a survey of

the selected tract and defining its boundaries, or referring to a map thereto annexed, was indispensable to give precision to the title. *Rutherford* v. *Green*, 2 Wheaton, 196; *Lessieur* v. *Rice*, 12 Howard, 59; *Doe* v. *Wilson*, 23 *Id.*, 461; *Crews et al.* v. *Burcham*, 1 Black, 356; *Best* v. *Polk*, 18 Wall., 112; *Schulenberg* v. *Harriman*, 21 *Id.*, 44. But fractional section one is described with unmistakable certainty. No preliminary proceeding was necessary to identify it. As detaching it would not, in the opinion of the President, injure the reservation, the defendant had at least a beneficial and transferable interest therein, enuring from the date of the joint resolution. A complete equitable title is sufficient in Kansas to maintain an action for the recovery of real property, (*Kansas Pacific R. R. Co.* v. *Bratney*, 12 Kans., 1,) and is therefore, when set up by a defendant, equally available to defeat a recovery. If the doctrine were otherwise settled, we might well insist that the absolute legal title to that section vested without the order of the President formally setting it apart to the defendant. But that point need not be discussed. The resolution of July 26, 1866, gave to that order all its operative effect. It is not only an essential part, but the groundwork of the defendant's title. All that was subsequently done pursuant thereto has relation to that date. "There is no rule better founded in law, reason, and convenience than this, that all the several parts and ceremonies necessary to complete a conveyance shall be taken together as one act, and operate from the substantial part by relation." Cruise's Digest, vol. 5, p. 510. "The right to a patent once vested is equivalent, as respects the Government dealing with the public lands, to a patent issued. When issued, the patent, so far as may be necessary to cut off intervening claims, relates back to the inception of the right of the patentee." *Stark* v. *Starr*, 6 Wallace, 402.

The United States, at the date of the joint resolution of 1867, having, by reason of a prior grant to the defendant, no title to fractional section one, the patent therefor to the plaintiff is absolutely void. In addition to the authorities first above cited, we refer to *Best* v. *Polk*, 18 Wallace, 112; *Morton* v. *Nebraska*, 21 *Id.*, 660. It is an elementary principle that where conflicting grants, either of which would be good in the absence of the other, have been improvidently made, the party claiming under the elder must prevail.

The joint resolution and the patent upon which plaintiff relies are respectively of a later date than the resolution and the executive order put in evidence by the defendant.

We have considered this case as if the proviso had not been annexed to the joint resolution of 1867. That proviso, or excepting clause, was also inserted in the plaintiff's patent, and speaks of a grant of "part of the land heretofore made by the United States." The District Court finds that there was no such grant other than the resolution of 1866. Congress manifestly referred to the latter, and, construing it to be a grant, confirmed and ratified it by excepting the land it embraced from the subsequent conditional grant of the tract between the Smoky Hill river and the Republican. We have thus a legislative interpretation of that enactment. The President, after reciting it and referring to the report of General Sherman in his order, declares that "the *grant* specified in said resolution be, and the same is hereby, approved."

Notwithstanding the concurring opinions of the Legislative and the Executive Departments as to the character and effect of the resolution of 1866, the plaintiff assumes that no grant was thereby made. We can only repeat that our title proceeds therefrom, and that in the absence

of the right thence derived and of the authority on the President thereby conferred, his order would have been illegal and void. Whether that order, issued by him in the discharge of a purely ministerial duty, be requisite to perfect the title is entirely immaterial.

It is said that "set apart" are apt words to pass, not the land, but the temporary use thereof, revocable at the pleasure of Congress, and that they are not of equivalent import with "grant." We admit that they are sometimes employed in a limited sense. If a tract be withdrawn from market, or be, as all this reservation had been, set apart for public uses, no title thereto passes. It is only segregated for a special purpose and withheld from sale, and from homestead or pre-emption settlement. The general laws touching the disposal of the public lands have no relation to it, although they do not, in terms, exclude it. *Jackson* v. *Wilcox*, 13 Peters, 498. But where by enactment, treaty, or patent it is appropriated in perpetuity to a corporation or an individual, it thereby ceases to be the property of the United States. The case just cited holds that "*appropriating*" and "*setting apart*" public lands are words of the same signification, and this Court has said that a patent is a complete *appropriation* of the land it describes. *Boardman et al.* v. *Lessee of Reed et. al.*, 6 Peters, 328. Chief Justice Marshall, in *Rutherford* v. *Green*, *supra*, says: "the validity of a legislative act depends in no degree upon its containing the technical terms used in a conveyance." When, as in this case, the evident intention was to make over the soil and freehold, no particular form of expression is necessary to carry it into effect. Whatever vests the uses of, and the dominion over, the land, vests the land itself. As there are no restrictive words limiting the quantity of interest, we submit that if the resolution provided for the transfer

of any right in and to the demanded premises, it was of the full and absolute ownership thereof.

The plaintiff insists that if the resolution be construed to be a grant of land, the estate of the defendant has determined by reason of a breach of the condition subsequent thereto annexed.

The alleged breach consists in defendant's marking and laying off in town lots said fractional section one as an addition to the town of Junction City, except a strip occupied as a right of way, to a width of fifty feet on each side of its track, and a piece of land comprising thirty-three acres; in duly recording a plat of said section, July 12, 1867, and in not only ceasing ever since to use the same (except said right of way and said thirty-three acres) for any purpose connected with its business of running and operating its railroad, but in offering the same for sale, and selling some of the lots so laid out and platted. (Record, p. 30, folio 73.)

It is true that all the land was granted for "depot and other purposes," that is, as a site for a depot, and for any other purpose required by the company. After reserving what was necessary for such a building, the remainder might be lawfully sold, and the proceeds applied to the erection of workshops, the improvement of the road, the purchase of rolling stock, or the payment of debts.

It is hardly necessary to say that the words relied upon do not make a condition subsequent, and there is no provision that in any event the land shall revert; but conceding, for the sake of argument, that there was such a condition, as well as a breach thereof, our title remains unimpaired. Congress alone can enforce a forfeiture, *Schulenberg* v. *Harriman*, *supra*, but so far from having done so by directing judicial proceedings or otherwise, that body unequivocally declared, by the joint resolu-

tion of 1867, that nothing therein contained should interfere with our prior grant.

We think that we have conclusively made out the following propositions:

First. That no title to the premises in dispute vested in the plaintiff by the joint resolution of 1867, as the conditions precedent therein mentioned—the acceptance of the grant by a subsequent act of the Legislature of Kansas, &c.—were never performed, and that the patent issued thereunder is without effect.

Second. That as the premises could, in the opinion of the President, be severed from the Fort Riley reservation without impairing its usefulness for military purposes, they were vested in the defendant by the resolution of July 26, 1866, either directly, or by an executive order pursuant thereto and relating back to that date, and that any subsequent pretended transfer of them by the United States to other parties, either by grant or patent, passed no title thereto.

Third. The joint resolution of March 2, 1867, does not dispose, or assume to dispose, of the premises, but expressly excludes them from its operation, as they are covered by "a grant" theretofore "made by the United States," and it must be regarded as a reaffirmance of the defendant's title to them.

The judgment of the Supreme Court of Kansas should, it is respectfully submitted, be affirmed.

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